Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ALBERT MORGAN, JR.,
Petitioner,

v.

TOGO D. WEST, JR.
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Appeals Court committed serious error by granting Respondent motion to waive the requirements of Federal Circuit rule 27 (f) and dismiss petitioner's appeal for the denial of service connection for Sarcoid Arthritis of both knees, because it does not have jurisdiction under the Veterans Judicial Review Act Pub. Law No. 100-687. Div. A.102 Stat. 4105 (1988) in accordance to 38 USC S. 7292 based on the medical opinion of one doctor, Dr. Mark Burns, dated June 26, 1997 who was chosen by Respondents Board of Veterans Appeals to render an opinion based on evidence of record concerning what is the correct diagnosis for Petitioners V.A. approved service connected pain and arthritis disability of both knees that he is presently suffering with is it Degenerative Arthritis that can be seen on x-rays of both knees as claimed and ruled by Respondents Veterans Administration or is it Sarcoidosis disability rating of March 6, 1980 non-service connected.

The medical opinion in Dr. Burns report from Bronx, New York used by the Appeals Court to deny that it has jurisdiction in this case as stated by Dr. Burns in his report he does not feel that Sarcoid Arthritis that is causing pain in both knees in 1976 was likely the case for the pain in the knees Albert Morgan, Jr. had from 1970 until 1971, while in the military. He also states he does not know what was the cause of the knee pain Albert Morgan, Jr. had while on active duty.

No. 1 - The Appeals Court committed reversible error because its decision is based on a false medical information or false medical history or is based on a history of pain in both knees that began in the military while in Vietnam in 1970 and ended while still in the military in 1971 given only in Dr. Burns report.
This history of pain is not the history of Petitioner's pain, and it is not found inside military or VA records.

No. 2 - The Appeals Court committed reversible error because its decision is based on contention or issue not raised by Petitioner before VA Regional Office, the Board of Veterans Appeals, or the Court of Veterans Appeal.

No. 3 - The Appeals Court committed reversible error because its decision is not based on all the medical evidence of record.

No. 4 - The Appeals Court committed reversible error because it did not render a decision based on Petitioners VA approved service connected pain of both knees and his VA approved service connected 10 percent arthritis disability of both knees in accordance to the mandate in the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003.

No. 5 - The Appeals Court committed reversible error because it did not address Petitioner's issue raised before the VA Regional Office, the Board of Veterans Appeals and the Court of Veterans Appeals contending that the VA approved service connected 10

percent arthritis disability in accordance to the mandate in the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 causing the VA approved service connected pain in both knees is Sarcoid Arthritis seen on bone scan films of both knees, and that the Board of Veterans Appeals committed Obvious Error when it ruled that it was Degenerative Arthritis that can be seen on x-rays of both knees in accordance to the mandate in 38 C.F. R. Part 4 Diagnostic Code 5003 in its May 27, 1983 decision.

No. 6 – The Appeals Court committed reversible error because it did not render a decision based on the findings in Dr. Burns report that Bone Scan Films of both knees show Sarcoid Arthritis of both knees being the cause for the VA approved service connected pain Petitioner is having in 1976 and Dr. Burns' findings that x-rays of both knees are negative and do not show Degenerative Arthritis and Degenerative Arthritis did not exist when Petitioner was in the military in 1971.

No. 7 – The Appeals Court committed reversible error because the denial decision for Sarcoidosis conflicts with the mandate in the VA Schedule Rating 38 C. F.R. Part 4 Diagnostic Code 5003 used by Respondent's Board of Veterans Appeals in its May 27, 1983 approved decision, approving Petitioner service connected for a 10 percent arthritis disability of both knees and service connection for the VA approved total and permanent Sarcoidosis disability rating of March 6, 1980

based on medical evidence of record stating that the arthritis can be medically seen at both knees or Sarcoid Arthritis that can be seen on Bone Scan films of both knees and not x-rays of both knees that do not show Degenerative Arthritis, or is not evidence inside VA records.

No. 8 – The Appeals Court committed reversible error because Respondent is presently paying Petitioner service connected compensation for Sarcoid Arthritis of both knees, but has adjudicated it being Degenerative Arthritis seen on x-rays of both knees in order to Hide the fact that Petitioner was approved service connected for his VA approved total and permanent Sarcoidosis disability rating of March 6, 1980 that was ruled non service connected on that date.

No. 9 – The Appeals Court committed reversible error because its decision based on a False medical history in Dr. Burns report conflicts with the U.S. Court of Veterans Appeals Decision no. 91-1865 dated April 7, 1993 vacating the September 19, 1991 decision of the Board of Veterans Appeals denying service connection for Sarcoidosis because it contained inaccurate medical information which was negative Bone Scan films of both knees report which was not that of Petitioner. This decision was rendered by Judge Farley. (See App. 62)

No. 10 – The Appeals Court committed reversible error because Judge Farley's 1993 decision vacating the September 1991 decision of the BVA, denying service

connection for Sarcoidosis because it contained inaccurate medical information conflicts with Judge Farley's decision dated February 22, 1999 affirming the denial decision for Sarcoid Arthritis of both knees by the Board of Veterans Appeals dated September 29, 1997 based on a false medical history or inaccurate medical information. (See App. 4)

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit granting Respondent's motion to waive the requirement of Federal Rule 27(f) and dismiss Petitioner's appeal for lack of jurisdiction cited as 97-7100 (November 2, 1999) (See App. 1).

The opinion of the Court of Appeals for the Federal Circuit is a public order cited as No. 99-7100 dated March 17, 2000. Denying Petitioner's request for rehearing. (See App. 25)

The opinion of the Court of Veterans Claims in Albert Morgan, Jr. v. Togo D. West, Jr., cited as number 97-1908 dated February 22, 1999. (See App. 4). The decision of the Board of Veterans Appeals denying service connection for Sarcoidosis Arthritis of both knees on appeal from the VA Regional Office dated September 29, 1997, Docket # 91-12 657 (See App. 26).

The Board of Veterans Appeals approved decision Docket No. 80-29-153 dated May 27, 1983 in which the mandate in the VA Schedule Rating 38 C.F.R. Part 4

Diagnostic Code 5003 that was used by the Board of Veterans Appeals in this decision approved (See App. 52). Petitioner a service connected 10 percent rating for Sarcoid Arthritis of both knees or arthritis seen on bone scan films of both knees that the etiology for or cause for is Petitioner's total and permanent Sarcoidosis disability VA Regional Office rating of March 6, 1980. (See App. 47). The mandate in the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 will not allow the granting of a service connected 10 percent rating for arthritis of both knees based on negative x-rays of both knees or x-rays that do not show Degenerative Arthritis.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. S. 1254(1).

The Judgment of the Federal Circuit was entered on November 2, 1999. The denial for rehearing was entered on March 17, 2000.

PROVISIONS INVOLVED

United States Constitution Fifth Amendment Due Process of Law and Equal Protection.

38 C.F.R. Part 4 Diagnostic Code 5003 mandates a disability rating for arthritis that can be seen at both knees.

38 C.F.R. 20-1000 allows the Board of Veterans Appeals to reconsider its own decision. Reconsideration of an Appellate decision may be accorded at any time by the Board of Veterans Appeals on motion by the Appellant or his or her representative or on the Boards own motion.

(a) upon allegation of obvious error or fact or law.

(b) upon discovery of new and material evidences in the form of relevant records or reports of the service department concerned.

(c) upon allegation that allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of Appellant.

38 C.F.R. S. 3.310. Proximate results, secondary conditions. Disability, which is proximately due to, or results of a service connected disease or injury shall be service connected. When service connection disease or injury shall be established for a secondary condition the secondary condition shall be considered a part of the original condition.

STATEMENT OF THE CASE

The Petitioner, a Vietnam veteran, born on November 20, 1949, was an infantryman in the U.S. Army from July 11, 1969 until July 12, 1971.

On January 22, 1971 and January 25, 1971 Petitioner was examined by a military physician for his complaint of pain in both knees. (See App. 95 in brief on merit filed below).

On February 23, 1971 Petitioner received a provisionally diagnosis of possible arthritis of both knees while still in the military service. (See App. 80)

On April 19, 1971 the Petitioner was medically instructed against stair climbing, and standing over 10 minutes each hour. (See App. 97 in brief below).

On October 12, 1971 Petitioner was examined by a VA Orthopedic physician for his complaint of pain in both knees that began while Petitioner was in the Military. X-rays of the knees are normal. (See App. 98 in brief filed below).

On November 08, 1971 VA Regional Office Rating decision denied Petitioner service connection for arthritis of both knees because arthritis was not found on last examination or on x-rays of both knees. Bone scan films of both knees were not taken. (See App. 99 in brief below).

On May 24, 1973 Petitioner entered the Veteran's Administration Hospital at Little Rock, Arkansas complaining about pain in both knees that began while in the military in 1970-1971 and x-rays of both knees were normal. Bone scan films of both knees were not taken. (See App. 81 in brief below).

On November 9, 1973 the VA Regional Office rendered another Rating decision denying Petitioner service connected compensation for arthritis causing his pain in both knees. X-rays of the knees are negative. Degenerative Arthritis was adjudicated the cause for the pain in both knees. (See App. 102 in brief below).

On July 2, 1975 Petitioner entered the VA Hospital at Little Rock, Arkansas complaining about pain in both knees, x-rays of both knees were within normal limits. Bone scan films of both knees were not taken. (See App. 103 in brief below).

On June 7, 1976 Petitioner was examined by VA Hospital for his complaint of pain in both knees that began while in the military in 1970 and 71. Pain medication was prescribed. (See App. 104 in brief below).

On August 8, 1976 Petitioner was given a rating examination by the VA Hospital in Memphis, Tennessee for his service connection pain in both knees, rated 0 percent for Degenerative Arthritis. X-rays of both knees are normal. The physician states that he could not find anything really upon examination to make a diagnosis. Bone scan films of

both knees were not taken. (See App. 105-106 in brief below).

On July 14, 1977 bone scan films of both knees were taken for the first time by the Baptist Hospital which show arthritis of both knees or Sarcoid Arthritis of both knees causing the VA approved service connection pain of both knees. (See App. 68 in brief filed below).

In the VA medical report dated March 28, 1978 Petitioner had performed liver, lung and lymph node biopsies. Biopsy of the liver and lymph nodes revealed Sarcoid granulomas disease. On February 13, 1978 Petitioner amended his VA claim to include service connection for Sarcoidosis based on his pain in both knees that is service connected and caused by Sarcoidosis, or is Sarcoid Arthritis on bone scan films of both knees. (See App. 87-88 in brief filed below).

On December 15, 1978 the Board of Veterans Appeals rendered a decision denying service connection for Sarcoidosis. Reason given for this decision in its Findings of Facts is

1. Sarcoidosis was not present during service or at time of separation in May of 1971.

2. The possibility of Sarcoidosis was reported many years after service.

3. There was no casual relationship between the veteran's service connected Degenerative joint disease of the knees and the possible Sarcoidosis found after military

service. In its conclusion of law it states

1. Sarcoidosis was not incurred in or aggravated during service or manifested to the required degree within one year from the date of termination of service.

2. Sarcoidosis is not proximately due to or the result of a service connected disease or injury. (38 C.F.R. 3.310). (See App. 110-113 filed in brief below).

On January 8, 1980 Petitioner was given an orthopedic, general medical, and pulmonary medical examination by the Veterans Administration Hospital in Shreveport, Louisiana for VA Regional Office rating purposes in order to determine if Petitioner is totally disabled and is the service connected for Sarcoidosis or is Sarcoidosis the cause for the service connected pain in both knees that began while in the military in 1970-71. It is stated in this medical examination that Petitioner began to have pain in both knees while in the military in 1970 and Petitioner was discharged from the military while still on a medical profile for the pain in both knees. It is also stated that the pain continued after military service.

The impression given by the physician as to the cause for this pain in both knees is that it is apparently secondary to Sarcoidosis and that the Sarcoidosis with symptoms of weakness and multiple joint pain sufficient to prevent work. (See App. 70).

On March 6, 1980 the VA Regional Office rendered

a decision based on the above-mentioned medical report of January 8, 1980 that Petitioner was totally and permanently disabled for Sarcoidosis non-service connected. The VA Regional Office also ruled that service connection for Sarcoidosis is not established. This conflicts with the VA medical report that it is service connected. The VA Regional Office also ruled in this decision that Petitioner was not entitled to an increase for Degenerative Arthritis of both knees because increased severity of the knees is not shown. X-rays of both knees are adjudicated negative. Bone scan films showing Sarcoidosis Arthritis of both knees is not mentioned. The erroneous diagnosis of Degenerative Arthritis of both knees continue to be used as the cause for the service connected pain of both knees that is caused by the Sarcoid Arthritis on bone scan films of both knees. (See App. 47-49).

Dated March 16, 1983 Petitioner submitted supplemental arguments to the Board of Veterans Appeals Docket No. 80-29-153 claiming, based on evidence of the record he did not have Degenerative Arthritis and it cannot be seen on negative x-rays of both knees and it is not the cause for the service connected pain of both knees but bone scan films of both knees showing arthritis that is caused by the Sarcoidosis disability is the cause for the service connected pain of both knees. (See App. 115-116 filed in brief below).

On May 27, 1983 the Board of Veterans Appeals in

its decision Docket No. 80-29-153 approved Petitioner a service connected 10 percent disability for arthritis of both knees based on medical evidence of record stating that the arthritis can be seen at both knees in accordance to the mandate requirement in the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 requiring such rating because the arthritis can be seen on bone scan films of both knees evidence.

The Board of Veterans Appeals committed Obvious Error in this decision when it ruled that it applied the VA Schedule rating to x-rays of both knees showing Degenerative Arthritis.

The Board did not identify any physician who has made a diagnosis that Degenerative Arthritis can be seen on x-rays and is not evidenced in this case. (See App. 52).

On June 22, 1983 in the VA Regional Office Rating Decision the service connected 10 percent arthritis disability is finally adjudicated caused by Degenerative Arthritis a 60 percent rating for Sarcoid Arthralgia and the 30 percent rating for Sarcoidosis which allowed the total and permanent disability rating remained non-service connected. (See App. 58).

On April 7, 1993 the Court of Veterans Appeals vacated the September 19, 1991 decision of the Board of Veterans Appeals denying service connection for Sarcoidosis because it contained inaccurate medical

information which is negative bone scan films of both knees. (See App. 62).

On September 29, 1995, in its decision Docket No. 91-12-657, the Board reopened all its denial decisions for Sarcoidosis for December 1978, November 1982, May 1985 and October 1989. It also reopened the May 27, 1983 approved decision. Reason given for this decision is evidence added to the record since the November 1982 Board decision denying service connection for Sarcoidosis on the merits is not wholly cumulative and when viewed in conjunction with the evidence previously of record is sufficient to raise a reasonable possibility of an outcome different from that reached by the Board in 1982. This decision by the Board was based on the medical report of a Rheumatologist, Dr. Stewart Leibowitz, who states that Sarcoidosis is realistically the cause of pain in the knees that has been present intermittently for some time and the medical report of Petitioner's treating physician Dr. Harold Betton, dated May 29, 1986. (See App. 52 in brief below). Dr. Betton states that Mr. Morgan has been a patient of mine for quite some time. I first evaluated him in 1983 for Sarcoidosis and joint pain. I reviewed his old medical records from Dr. Raymond P. Miller, Dr. David Barnett, dr. Robert Lewis and other VA records and agree wholeheartedly that this patient still has problems with his knees and that the link lies with Sarcoidosis while in the service he was diagnosed as having arthritis. The arthritis

was later diagnosed due to Sarcoidosis. It therefore stands to reason that the Sarcoidosis existed while in the military must have service connection for Sarcoidosis since the Sarcoidosis is the etiology for the arthritis. Because the Board ruled that these reports were new and material evidence it remanded the case back to the VA Regional Office for it to render another decision based on all evidence of record. (See App. 78).

On June 14, 1996 the VA Regional Office rendered another decision denying service connection for Sarcoid Arthritis of both knees. Prior to this decision Petitioner submitted the medical reports of an arthritis specialist Dr. Ross Bandy, employed by Levi Hospital in Hot Springs, Arkansas. His reports are dated October 17, 1995, November 7, 1995 and November 17, 1995. Dr. Bandy gave Petitioner a medical examination and reviewed VA medical records. X-rays were taken of the left knee that are negative. He also states that bone scan films of both knees show arthritis that is compatible with Sarcoid Arthritis. He also states that Petitioner's history of pain in both knees that began while in the military in 1970 was secondary to Sarcoidosis. (See App. 81-85 in brief below). The VA Regional Office did not address Petitioner's issue that the VA approved service connection of 10 percent arthritis disability is Sarcoid Arthritis in accordance to the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 and not the erroneous Degenerative Arthritis not seen on x-rays

of both knees. The VA Regional Office states its decision was based on a Rheumatologist from the VA Hospital who reviewed the veteran's claims folder and the findings of the Levi Hospital. His opinion was that a diagnosis of Sarcoid Arthritis was not in order and that a biopsy of the knees was needed in order to confirm the diagnosis. The VA Regional Office did not stop using Degenerative Arthritis as the cause for the service connected 10 percent disability that the etiology for is the VA approved total and permanent Sarcoidosis disability rating of March 6, 1980. (See App. 47-49).

On June 24, 1996 Petitioner submitted his notice of disagreements to the VA Regional Office on Appeal to the Board of Veterans Appeals of its decision on June 14, 1996 denying service connection for Sarcoid Arthritis of both knees. Petitioner stated that he disagreed with their decision.

1. The Veterans Administration is committing error because it has classified the veteran's condition as Degenerative Arthritis, and this is a condition that the veteran does not have, as evidenced by medical reports in the record.

2. There is no physician in the record who has diagnosed that the veteran has Degenerative Arthritis of both knees.

3. Both VA and private physicians state that x-rays of veteran's knees are normal.

4. Dr. Charles Mckenzie, a VA physician s states in his medical report dated December 20, 1982, that x-rays of both of the veteran's knees do not show evidence of Degenerative Arthritis.

5. VA and private physicians records state that the appellant's service connected joint pain that began while in the military service, was an early manifestation of Sarcoidosis that was diagnosed after military service.

6. Appellant's total and permanent Sarcoidosis disability is secondary to his service connected arthritis disability of both knees.

7. The VA committed obvious error in its May 27, 1983. Decision when it classified the 10 percent service connected arthritis disability that was approved by it in accordance with the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 as being Degenerative Arthritis that they claimed could be seen on x-rays of both knees, instead of Sarcoid Arthritis that can actually be seen on bone scan films of both knees.

8. It is mandated in the VA Schedule Rating 38 C. F.R. Part 4 Diagnostic Code 5003 that the appellant be granted no less than 10 percent rating for arthritis of both knees because there is medical evidence in the appellant's VA record that the arthritis can be medically seen in both knees.

9. Finally, appellant contends that he had Sarcoid Arthritis, which developed while he was in the

military and rendered him totally and permanently disabled on March 6, 1980. (See App. 43).

This case was docket before the Board of Veterans Appeals under no. 91-12657. The Board felt, before it could render a decision it needed an opinion from Dr. Mark Burns, a Rheumatologist in Bronx, New York. (See App. 65). The Board requested that he give an opinion based on evidence of VA records as to whether Petitioner's in service pain in both knees were the initial manifestations of Sarcoidosis. Because the veteran has claimed over the years, and now in essence, that his in-service bilateral knee disability was the early manifestation of Sarcoidosis. That is, he alleges that the diagnosis of Degenerative Arthritis was incorrect and that instead he has Sarcoid Arthritis or Sarcoid Arthralgia.

On September 29, 1997 the Board of Veterans Appeals rendered its decision denying service connection for Sarcoidosis based on the opinion in Dr. Burns' report dated June 26, 1997 that he did not feel that the Sarcoidosis pain in 1976 was the likely cause of Petitioner's pain from 1970-71 or pain that ended in 1971 while in the military. (See App. 26). The Board did not address Petitioner's issue or contentions that the VA approved service connected pain and 10 percent arthritis disability is caused by Sarcoidosis or is Sarcoid Arthritis or arthritis that the caused for is the VA approved Total and Permanent Sarcoidosis disability in accordance to 38 C.F.R. Part 4 Diagnostic Code 5003 and

not Degenerative Arthritis that cannot be seen on x-rays.

The Board did not render a decision on Dr. Burns' findings in his report that x-rays do not show Degenerative Arthritis and it did not exist while Petitioner was in the military service and that bone scan films taken in 1977 show Sarcoid Arthritis that is causing pain in both knees in 1976.

The Board of Veterans Appeals did not stop using Degenerative Arthritis as the cause for Petitioner's VA approved service connected pain in both knees that he is suffering with in 1976 and 1977.

The Board decision was based on a false medical history or a history about pain that began and ended while Petitioner was in the military in 1970-71. This is not the medical history of Petitioner inside VA records.

Petitioner appealed this decision to the Court of Veterans Appeals. On April 8, 1988 Petitioner submitted his Brief in support of his appeal claiming that the VA approved service connected 10 percent arthritis disability is Sarcoidosis Arthritis in accordance to 38 C.F.R. 4 Diagnostic Code 5003 and that the Board of Veterans Appeals committed Obvious Error when it ruled it was Degenerative Arthritis on x-rays of both knees in accordance to 38 C.F.R. 4 Diagnostic Code 5003. The Court of Veterans Appeals did not address this issue in its decision. Petitioner also claimed that the VA approved total and permanent Sarcoidosis disability was secondary to the VA approved service connected 10 percent arthritis disability of

both knees.

On February 22, 1999 the Court of Veterans Appeals rendered its decision affirming the denial decision for Sarcoidosis by the Board of Veterans Appeals based on the false medical history in which Dr. Burns rendered his opinion in his report. The Court of Veterans Appeals did not stop Respondent from using the erroneous diagnosis that Degenerative Arthritis could be seen on x-rays of both knees as evidenced or as the cause for Petitioner's service connected 10 percent arthritis disability and pain of both knees. (See App. 4). Petitioner appealed this decision to the United States Court of Appeals for the Federal Circuit. Petitioner claimed before the court that the Court of Veterans Appeals committed serious error or unconstitutional error:

1. When it used, as evidence, the opinion in Dr. Burns' report that was based on a history of pain in both knees that began in 1970 and ended in 1971 while in the military. Reason being this is not Petitioner's history of pain in both knees. This is a false history and was not evidenced inside VA records at the time Dr. Burns rendered his opinion.

2. Petitioner claimed that the Court of Veterans Appeals erred because it did not address his issue raise before it that the VA approved service connected 10 percent arthritis disability of both knees is Sarcoid Arthritis on bone scan files of both knees, and that the Board of Veterans

Appeals committed Obvious Error under 38 C.F.R. 20-1000 when it classified it being Degenerative Arthritis on x-rays of both knees in accordance to mandate in the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 instead of Sarcoid Arthritis of both knees.

3. Petitioner claimed that the Court of Veterans Appeals Court of Veterans Appeals erred because it did not address the issue raised before it that the VA approved service connected 10 percent arthritis disability of both knees is secondary to the VA approved total and permanent Sarcoidosis disability that Respondent ruled on March 6, 1980 as non-service connected. Reason being x-rays are negative and do not show Degenerative Arthritis or x-rays do not show the 10 percent arthritis disability of both knees, but bone scan films of both knees show the 10 percent service connected arthritis disability of both knees in accordance to 38 C.F.R. Part 4 Diagnostic Code 5003.

4. Petitioner claimed that Court of Veterans Appeals erred in its decision because the pain Petitioner is suffering with in both knees in 1976, that Dr. Burns states in his report, is caused by the Sarcoid Arthritis on bone scan films taken of both knees in 1977 is VA approved service connected pain of both knees that the VA has ruled and is claiming is caused by Degenerative Arthritis of both knees in 1977.

5. Petitioner claims Court of Veterans Appeals erred because his VA approved service connection in

accordance to 38 C.F.R. Part 4 Diagnostics Code 5003 for Sarcoid Arthritis of both knees, supercedes all VA denial decisions for Sarcoidosis.

On September 10, 1999 Respondent filed a Motion for Enlargement of Time until October 1, 1999 in order to respond to Petitioner's Brief. The Appeals Court did not render a decision granting Respondent's Motion for Enlargement of Time. However, on October 1, 1999 Respondent filed another motion requesting that the Appeals court waive the requirements of Federal Circuit Rule 27(f) and dismiss for lack of jurisdiction. On October 14, 1999 Petitioner submitted his response in disagreement of this motion because Respondent is using manufactured evidence or Dr. Burns' opinion is based on a false medical history and Degenerative Arthritis can be seen on x-rays of both knees and is manufactured evidence.

On November 2, 1999 the Appeals Court granted Respondent's motion and dismissed Petitioner's appeal.

On December 15, 1999 Petitioner requested a Rehearing of this decision because it is based on a false medical history given in Dr. Burns' report. On March 17, 2000 the Appeals Court rendered a decision denying reconsideration. The Appeals Court rendered a decision denying reconsideration. The Appeals Court did not address Petitioner's issues raised before it. (See App. 25).

REASONS FOR GRANTING THE WRIT

Under 38 U.S.C. S. 7292 the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction to hear appeals from those decisions of the Court of Veterans Appeals found to be:

1. Arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law;

2. Contrary to constitutional right, power, privilege or immunity;

3. In excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right or,

4. Without observance of procedure required by law.

The Federal Circuit has the authority under this chapter to review decisions that present a constitutional issue.

The Federal Circuit committed error or unconstitutional error when it, under this chapter, denied jurisdiction and dismissed Petitioner's appeal for the reason given it did not present a constitutional issue. This decision is based on an opinion found in Dr. Mark Burns' medical report dated June 26, 1997. (See App. 65) An opinion about a history of pain that began and ended while Petitioner was in the military in 1970-71, which is an opinion about a history of pain in both knees which is a false history or is

not evidenced inside VA records at the time Dr. Burns rendered his opinion which was required to be based on evidence inside Petitioner's VA records. In Dr. Burns' report he did not feel that Sarcoid Arthritis, found on bone scan films in 1977 and causing pain in both knees in 1976, was the cause for this history of pain in both knees that ended in 1971 while in the military, or false history of pain in both knees. This is unconstitutional evidence, which mandates that the decision of the Federal Circuit be reversed.

The Federal Circuit decision denying jurisdiction is simply a decision based on a lie.

Dr. Burns also states in support of this opinion, that it's unlikely that Sarcoidosis would have been present from 1971 to 1976 without x-ray changes. This conflicts with the medical evidence of record showing x-rays to be normal in 1995; 18 years after it is seen on bone scan films of both knees taken for the first time by Baptist Hospital in 1977. (See App. 65). Dr. Burns did not discuss the fact that bone scan films were not taken during this period, which show the arthritis. Dr. Burns' opinion has created another issue or contention because based on this opinion, in order for Petitioner to prove he is service connected for Sarcoid Arthritis of both knees he must prove that the Sarcoid Arthritis, seen on bone scan films in 1977, is causing the pain in both knees since 1976 and is the cause for the pain in both knees that began and ended in 1971

while in the military. This is not the contention or the issue raised by the Petitioner at any time or is not evidenced inside VA records that he raises these contentions. The issue raised by Petitioner before the VA Regional Office, the Board of Veterans Appeals, The Court of Veterans Appeals, and the U.S. Court of Appeals for the Federal Circuit is in reference to Petitioner's VA approved service connected pain of both knees that he is suffering with in 1976 and that began while in the military and has continued until present. That Respondent's VA has ruled is caused by Degenerative Arthritis on x-rays of both knees and that Dr. Burns states in his report that this pain is not caused by Degenerative Arthritis because x-rays of both knees do not show it. Dr. Burns also states that Sarcoid Arthritis on bone scan films in 1977 is the cause for the pain in both knees in 1976 or is arthritis that the caused for is Petitioner's VA approved total and permanent Sarcoidosis disability rating of March 6, 1980. VA approved service connected for Sarcoidosis pain of both knees supersedes Dr. Burns' opinion based on a false medical history. (See App. 47 and 49) showing that Petitioner was rated total and permanently disabled for Sarcoidosis by the VA Regional Office on March 6, 1980 based on a 60 percent rating for Sarcoid Arthraglia and 30 percent for Sarcoidosis non-service connected. Degenerative Arthritis is continued as the cause for the VA approved service connected pain in both knees. 38 C.F.R. S. 3.310 states that disability that is proximately due to or

the result of a service connected disease or injury shall be service connected. The Federal Circuit committed reversible error because it did not stop Respondent from using Degenerative Arthritis as evidence.

The Federal Circuit committed reversible error because it did not render its decision based on all of the medical evidence of record in conjunction with the VA approved service connected pain of both knees, the VA approved service connected 10 percent arthritis disability of both knees and the VA approved total and permanent Sarcoidosis disability rating of March 6, 1980 as it did in Livingston v. Derwinski, 959 F. 2d 224, 225-26 (Fed. Cir. 1992); 38 U.S.C. S. 7292(d).

Petitioner will now talk about the controlling issue in this case that he raised before the VA Regional Office, The Board of Veterans Appeals, The Court of Veterans Claims and The U.S. Court of Appeals for the Federal Circuit claiming that the VA approved service connected 10 percent arthritis disability of both knees in accordance to 38 C.F.R. Part 4 Diagnostic Code 5003, that was approved by the Board of Veterans Appeals on May 27, 1983, is Sarcoid Arthritis and that the Board of Veterans Appeals committed obvious error in accordance to 38 C.F. R. 20-1000 when it ruled that it was Degenerative Arthritis that can be seen on x-rays of both knees in accordance to 38 C.F.R. Part 4 Diagnostic Code 5003 instead of Sarcoid Arthritis that can be seen on bone scan films of both knees.

(See App. 52). In the May 27, 1983 approved decision of the Board of Veterans Appeals. Degenerative Arthritis that Respondent Board of Veterans Appeals ruled can be seen on x-rays of both knees is unconstitutional evidence based on negative x-rays of both knees that do not show Degenerative Arthritis. It is being used by Respondent to hide the fact that the VA approved service connected 10 percent arthritis disability is Sarcoid Arthritis or is arthritis that the etiology for or is caused by the VA approved total and permanent Sarcoidosis disability rating of March 6, 1980. This issue was not addressed by the Board of Veterans Appeals or the Court of Veterans Claims and it was not addressed by the Federal Circuit. (See App. 43) showing that the issue was raised below before the VA Regional Office and the Board of Veterans Appeals.

The VA Regional Office, the Board of Veterans Appeals, the Court of Veterans Claims and the U.S. Court of Appeals for the Federal Circuit, had the authority to stop the illegal use of the unconstitutional evidence that Degenerative Arthritis can be seen on x-rays of both knees. As a matter of law the Court of Veterans Claims and the Federal Circuit had the authority to review the May 27, 1983 decision of the Board of Veterans Appeals in order to make a determination based on evidence of the record on May 27, 1983 as to whether or not the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 was applied to x-rays of both knees or bone scan films of both knees, which allowed the

granting of the service connected 10 percent arthritis disability of both knees. See Bently v. Derwinski cited as 1 Vet. App. 28 (1990). The Court of Veterans Claims rule in this decision that the disability Schedule Rating used by the VA was applicable to medical evidence of record requiring a higher rating than that allowed by the VA.

The VA approved service connection for Sarcoid Arthritis in accordance to 38 C.F.R. Part 4 Diagnostic Code 5003 supersedes all VA denial decisions for Sarcoidosis. On June 22, 1983 the VA Regional Office final adjudicated the May 27, 1983 decision for payment. (See App. 58) showing a service connected 10 percent rating for arthritis of both knees being Degenerative Arthritis, the 60 percent for Sarcoid Arthralgia and 30 percent for Sarcoidosis remains non-service connected.

Respondent is presently paying Petitioner service connected compensation for Sarcoid Arthritis of both knees but refuses to pay service connected compensation for the total and permanent Sarcoidosis disability rating of March 6, 1980 that he is entitled to as a matter of VA approved law. The heart of the problem is the unconstitutional evidence that Degenerative Arthritis can be seen on x-rays of both knees. When Respondent is commanded to stop using this diagnosis as evidence it will show that the decision denying service connection for Sarcoidosis is a moot issue or is an unconstitutional decision. Under the Fifth Amendment to the U.S.

Constitution, Petitioner is being denied due process and equal protection by not addressing his issue raised before Respondent's VA Regional Office, Board of Veterans Appeals, Court of Veterans Claims and the U.S. Court of Appeals for the Federal Circuit. The erroneous Degenerative Arthritis evidence that is being used in the May 27, 1983 approved decision of the Board of Veterans Appeals, and in the June 22, 1983 VA Regional Office final adjudication decision, and the false medical history given in Dr. Burns' opinion is also denying Petitioner due process and equal protection under the Fifth Amendment to the U.S. Constitution. Because it is not allowing Petitioner to be paid service connected compensation by Respondent for his total and permanent Sarcoidosis disability VA approved in accordance to 38 C.F.R. Part 4 Diagnostic Code 5003.

Dr. Burns' opinion, based on pain that began in 1970 and ended in 1971 while in the military, also conflicts with the October 22, 1987 remanded decision of the Board of Veterans Appeals concerning entitlement to service connection for Sarcoidosis. Because the Board, in this decision, requested that Petitioner be examined by a Rheumatologist in order to determine the etiology for the service connected joint disease or arthritis of both knees. (See App. 59) Dr. Stewart Leibowitz is the physician who examined Petitioner in accordance to the Board remanded decision and he felt that Sarcoidosis was the cause for the arthritis of both knees. (See App. 85) Respondent's own

VA physician reported on May 29, 1980 that Sarcoidosis was the cause for this arthritis. (See App. 77) See the medical report from Dr. David Barnett dated July 23, 1980 reporting the findings of bone scan taken by the VA in 1979 which is compatible with Sarcoidosis with joint involvement. (See App. 79) The medial report of the Chief of VA Rheumatology Section, dated April 30, 1980, in his opinion given, is that Sarcoidosis is the cause for the pain in both knees and back. (See App. 82).

The medical report of a private Rheumatologist, who reported from his examination of Petitioner that he does not have Degenerative Arthritis, dated June 28, 1983 and signed by Dr. Donald G. Leonard. (See App. 64).

The medical report of Dr. Thomas P. Rooney, an Orthopedic Specialist dated September 18, 1980, states that the pain in both knees, that began while in the military in 1970, could be a manifestation of the Sarcoidosis and is probably related. (See App. 83).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted
Prose Albert Morgan, Jr.
#8 Howell Dr.
Little Rock, Arkansas 72204
Phone: (501) 227-9185

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

99-7100

ALBERT MORGAN, JR.,

Claimant-Appellant,

V.

TOGO D. WEST, JR., Secretary of Veterans Affairs,

Respondent-Appellee.

ON MOTION

Before MAYER, Chief Judge, NEWMAN and MICHEL, Circuit Judges. MICHEL, Circuit Judge.

ORDER

The Secretary of Veterans Affairs moves to waive the requirements of Fed. Cir. R. 27(e) and to dismiss Albert Morgan, Jr.'s appeal for lack of jurisdiction, and for an extension of time to file its response brief. Morgan opposes dismissal.

The Court of Appeals for Veterans claims (formerly Court of Veteran Appeals) affirmed the decision of the Board of Veterans' Appeals denying Morgan's claim for service connection for sarcoidosis of the knees. Morgan appealed to this court.

Pursuant to 38 U.S.C. § 7292, not every decision entered by the Court of Appeals for Veterans Claims is appealable. Section 7292(a) provides that a party may only seek review of a decision of the Court of Appeals for Veterans Claims with respect validity or interpretation of any statute or regulation relied on by the court in making its decision. Further, except to the extent that an appeal presents a constitutional issue, this court may not review "(A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). If an appellant's case does not meet these criteria, 38 U.S.C. § 7292(d) requires this court to dismiss the appeal.

Morgan argues that Court of Appeals for Veterans Claims erred in affirming the decision of the Board of Veteran's Appeals because the Board decision was "clearly erroneous." Morgan states the Board erred in relying on the medical opinion of Dr. Burns and in rejecting the opinion of other physicians who stated that "the service connected pain is related to the Sarcoidosis." Morgan challenges on appeal the facts and the application of the facts of his case to the law. Because Morgan does not challenge the validity or

interpretation of any statute or regulation or raise a constitutional issue relating to this claim, this court's limited jurisdiction does not permit appellate review of the decision of the Court of Appeals for Veterans Claims. See Livingston v. Derwinski, 959 F.2d 224, 225-26 (Fed. Cir. 1992); 38 U.S.C. § 7292(d).

Accordingly,

IT IS ORDERED THAT:

(1) The Secretary's motion to waive the requirements of Fed. Cir. R. 27(e) is granted.

(2) The Secretary's motion to dismiss is granted.

(3) The Secretary's motion for an extension of time is moot.

(4) Each side shall bear its own costs.

Designated for electronic publication only

United States Court of Veterans Appeals

No. 97-1908

Albert Morgan, Jr., Appellant,

v.

Togo D. West, Jr.,

Secretary of Veterans Affairs, Appellee.

Before FARLEY, *Judge.*

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. \$. 28(I), this action may not be cited as precedent.

FARLEY, *Judge:* This is an appeal from a September 29, 1997, decision of the Board of Veterans' Appeals (BVA or Board) which denied entitlement to service connection for sarcoidosis of the knees. Record (R.) at 11. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). For the reasons that follow, the Court will affirm the BVA decision.

I.FACTS

The appellant, Albert Morgan, Jr., served on active duty with the U.S. Army from July 1969 to July 1971 when

he received an honorable discharge. R. at 15. A preinduction examination report of May 1969 listed the appellant with "mild leg cramps." R. at 18. Beginning in January 1971, service medical records (SMRs) reveal periodic complaints of knee pain. R. at 32, 34-37. The knee pain was generally attributed to bilateral chondromalacia, a softening of any cartilage, most frequently under the patella. *Id.; see also* Dorland's Illustrated Medical Dictionary (Dorland's) 326 (27th ed. 1990). X-rays taken in 1971 showed "slight degenerative changes in both knees." R. at 33. SMRs, including the appellant's separation examination conducted in May 1971, provided no clinical or laboratory signs of sarcoidosis, which is a chronic, progressive, systemic granulomatous reticulosis of unknown etiology, involving almost any organ or tissue, including the skin, lungs, liver, lymph nodes, spleen, eyes, and small bones of the hands and feet. *See* Dorland's at 1485. Bilateral chondromalacia was noted upon separation. R. at 40-41. After separation, the appellant filed his an initial claim for "arthritis under both knee caps." R. at 48-49.

In October 1971, the appellant provided a VA examiner with a history of onset of bilateral passive knee pain in July 1970. R. at 56. During a physical examination, mild subpatellar crepitus on passive motion was noted. *Id.* Normal gait and range of motion were also indicated. *Id.* An orthopedic diagnosis of possible chondromalacia was made. *Id.* A medical certificate history dated May 24,

1973, provided a history of crepitance and stated that the appellant's pain was under the patella with no swelling or effusion and good stability. R. at 80-82. Chondromalacia was diagnosed. R. at 80. A VA examination conducted in October 1973 furnished a diagnosis of degenerative joint disease of the knees. R. at 90. In November 1973, the regional office (RO) granted service connection for degenerative joint disease of the knees, assigning a noncompensable rating. R. at 93.

In August 1976, a diagnosis of nonorthopedic disease was provided. R. at 110. At that time, no swelling, crepitation, or limitation of range of motion in the knees was found. R. at 109-10. The appellant's gait was found to be normal. *Id.* X-rays of the appellant's knees revealed no significant abnormality. R. at 112. The appellant was hospitalized in July 1977 with complaints of fever, generalized weakness, arthralgias, myalgias, and chills. R. at 140. Bone scan findings were consistent with arthritis. R. at 131. The appellant was again hospitalized from August to September 1977. R. at 154-57. He was diagnosed with recurrent fever and arthralgia, and probable tuberculosis. R. at 154-55. It was believed that the appellant's symptom were consistent with tuberculosis and sarcoidosis. R. at 155. Further observation for the possibility of sarcoidosis was advised. R. at 155.

In October 1977, the appellant was denied an increased rating for his service-connected knee condition.

R. at 163. The appellant sought to amend his claim in February 1978 to include a claim for service connection for sarcoidosis. R. at 185. He stated his belief that his problems with his knees were early manifestations of sarcoidosis. *Id.* SMRs from hospitalizations in October 1977 and March 1978 furnished diagnoses suggesting the possibility of sarcoidosis. R. at 182-84, 188-208. In March 1978, the appellant was diagnosed with "arthralgia of both knees, probably secondary to chondromalacia." R. at 189. Results of a liver biopsy taken in the same month contained findings consistent with granulomatous hepatitis of uncertain etiology, probably sarcoidosis in nature and primarily involving the liver. R. at 189, 215-16, 292-93.

In April 1978, the RO denied entitlement to service connection for sarcoidosis. R. at 219. The Board maintained the denial of service connection for sarcoidosis in a December 1978 decision. R. at 250. The Board explained that there was no evidence of a causal relationship between sarcoidosis and the appellant's period of service or his service-connected degenerative join disease of the knees. *Id.* The Board concluded that sarcoidosis was not incurred in or aggravated by service or manifested to the required degree within one year from the date of termination from service; nor was sarcoidosis proximately due to the result of a service-connected disease or injury. *Id.* During a March 1979 VA examination, complete range of motion of the appellant's knees was noted. R. at 322. There was no

effusion, redness, or thickening about the knee joints at that time. R. at 322. A history of sarcoidosis was noted but there was no discussion of any relationship between sarcoidosis and the appellant's knee complaints in service. At that time, the VA examiner saw no "isolated lesions in the bony structures that would be in keeping with a sarcoid type of infestation in the bony structures about the knees." *Id.* Subsequent treatment records provided a sarcoidosis history. R. at 370-90. In April 1979, a confirmed rating decision was issued. R. at 352. A Statement of the Case (SOC) was furnished to the appellant in May 1979. R. at 354-59.

The appellant was afforded a VA examination in January 1980. The examiner rendered a diagnosis of sarcoidosis with symptoms of weakness and multiple joint pain. R. at 410. The examiner based his diagnosis on a history of biopsy of the liver and of a neck lymph node showing the typical sarcoid changes. *Id.* A diagnosis of arthralgia effecting multiple joints apparently secondary to sarcoidosis was also made. *Id.* The examiner cautioned that he did not have access to the appellant's claims file and his diagnoses were based on the history provided by the appellant. *Id.* In a rating decision dated March 6, 1980, the RO continued the denial of service connection for sarcoidosis of the knees. R. at 424. An April 30, 1980, statement from Dr. Robert B. Lewis, who had seen the appellant in September 1979 for complaints of back and

knee pain, was submitted. R. at 430. Dr. Lewis opined that the appellant's pain at that time was related to his underlying sarcoidosis. *Id.*

The appellant was afforded a personal hearing in May 1980 at which time he testified that the diagnosis of degenerative arthritis of the knees was an error and that his symptoms were consistent with a diagnosis of sarcoidosis. R. at 444-45. A May 1980 statement from Dr. Raymond Miller, a VA staff physician, was provided which suggested that the appellant's knee complaints were on the basis of sarcoidosis. R. at 456. In June 1980, another VA physician reviewed the appellant's orthopedic and physical examinations and recognized that 'at no time [had] anyone demonstrated any swelling, effusion, thickening or instability about either knee to indicate that there [was] an involvement of [the appellant's] knees as a result of sarcoidosis or any other disease process." R. at 458. A memorandum from a VA staff orthopedist was submitted which stated that bone scan findings were compatible with the appellant's previous diagnoses of sarcoidosis with joint involvement. R. at 475. It was also opined that the appellant's "examination did not bear out any joint manifestations of his disease, and that his only complaint was pain." *Id.* A letter dated September 18, 1980, was submitted from Dr. Thomas Rooney, a private orthopedist, who opined that the appellant's joint pains could be a manifestation of sarcoidosis and that the two

were probably related. R. at 486. On examination of the knees, Dr. Rooney observed no abnormalities, increased temperature, or swelling. *Id.* The appellant exhibited full range of motion. *Id.*

In April 1981, the Board remanded the appellant's claim to the RO for further development. R. at 508-09. The RO forwarded the appellant's claims file and tissue slides to the Armed Forces Institute of Pathology (AFIP) for review and opinion. R. at 512, 517. An opinion letter dated November 13, 1981, from the AFIP stated that it was unable to substantiate a relationship between the appellant's chronic joint symptoms and his sarcoidosis. R. at 515. The AFIP agreed with the previous June 1980 appraisal that "at no time [had] anyone demonstrated any swelling, effusion or instability about either knee to indicate involvement of these joints as a result of sarcoidosis or any other disease process." *Id.* The AFIP further opined that the appellant's alleged musculoskeletal manifestations were not entirely characteristic of sarcoid arthritis or arthropathy. *Id.* In order to provide a more definitive opinion, the AFIP requested the opportunity to review all available x-rays and bone scans. *Id.* This was directed by the Board in its February 1982 BVA decision. R. at 534-37. In August 1982, the AFIP reported that the appellant's chest x-rays of May 1969 and July 1971 had been reviewed and that there was no evidence of sarcoidosis in the films. R. at 7. The AFIP opined that the appellant's sarcoidosis was first documented in 1978.

Id. Service connection for sarcoidosis was again denied by the Board in November 1982. The appellant was issued a 10% disability rating for service-connected degenerative joint disease in a May 1983 BVA decision. R. at 556-60.

In February 1984, the Board received a letter from the appellant indicating his desire to reopen his claim for sarcoidosis. R. at 600. The Chairman of the BVA notified the appellant that the November 1982 BVA decision relied upon the AFIP opinion and that the pathological reports which were not before the Board at the time of its decision may establish the existence of sarcoidosis in 1977 but were not likely to show that the disease began in service. R. at 602. In March 1984, Dr. E.J. Towbin, VA Chief of Staff, explained to the appellant the difference between x-ray findings of degenerative changes and a clinical diagnosis of degenerative arthritis. R. at 611. After a review of x-rays from Forrest Park Medical Clinic dated June 28, 1983, and a comparison with VA x-rays, Dr. Towbin indicated that there was no substantial change in the appearance of the appellant's knee joints and no definite evidence of sarcoidosis. R. at 611, 616. An SOC was issued in August 1984 continuing the denial of service connection for sarcoidosis. R. at 638-41. The SOC explained that no definitive evidence of sarcoidosis had been furnished. R. at 641. In January 1985, the appellant unsuccessfully attempted to have his diagnosis in his military record changed from degenerative arthritis to sarcoid arthritis. R.

at 643-45.

The appellant submitted a statement dated May 29, 1986, from Dr. Harold Betton, a private physician. R. at 733. Dr. Betton indicated that he had reviewed the appellant's old records and agreed that the appellant's knee problems were linked to sarcoidosis. *Id.* Dr. Betton assumed that the appellant's service-connected arthritis was later diagnosed as sarcoidosis and, based on this assumption, opined that sarcoidosis was the cause of the appellant's arthritis. *Id.* In decisions of May 1986 and October 989, the Board found that new and material evidence had not been submitted and declined to reopen the appellant's claim. R. at 724, 811. During an informal hearing in April 1987, the appellant requested that "in view of the difference of opinion as to the etiology of the [appellant's] knee problems and the time of onset of sarcoidosis" the Board consider submitting the appellant's claim for an independent medical expert opinion. R. at 763. The October 1989 decision was appealed to this Court in April 1990. This Court dismissed the appeal for lack of jurisdiction.

In April 1990, the appellant again requested that his service-connected degenerative arthritis denial was appealed to the Board who determined that the evidence submitted since the October 1989 BVA decision was not new and material and declined to reopen the appellant's claim. R. at 859-63. The Board decision was appealed to this Court. In an April 1993 memorandum decision, this Court noted that

the parties agreed that inaccurate information was before the RO and the Board, namely another veteran's bone scan, at the time of the decisions then on appeal and remanded the case for additional proceedings. R. at 984. The Board, in turn, remanded the case to the RO for further development in September 1993. R. at 1006-10. In accordance with the Board's remand instructions, the RO contacted the appellant in September 1993 and requested him to provide names, addresses, and approximate dates of treatment for any non-VA health care providers who had treated him for sarcoidosis since service, whose records had not previously been submitted to VA. R. at 1014-15.

In a November 1993 rating decision, the RO determined that new and material evidence had not been submitted and declined to reopen the claim. R. at 1025-26. The RO also found that the prior denials of service connection for sarcoidosis were not the subject of CUE. R. at 1025. The appellant's attorney submitted correspondence in December 1993, stating that the appellant had never requested to reopen a previously denied claim, but wished to pursue a claim for CUE in the May 1983 Board decision. R. at 1028-29. A Supplemental SOC (SSOC) was furnished. R. at 1031-38.

In a decision dated September 1995, the Board concluded the prior Board decisions denying service connection for sarcoidosis were final and not subject to collateral review for CUE under 38 C.F.R.. § 3.105(a). R. at

1109-20. The Board also determined that new and material evidence had been submitted and reopened the claim for entitlement to service connection for sarcoidosis of the knees. R. at 1116. The Board proceeded to remand the claim for additional development, including a VA examination by a certified rheumatologist and opinion regarding the etiology of sarcoidosis, if found to be present. R. at 1116-18. The decision was appealed to this Court.

A history of chronic, gradually worsening, bilateral knee discomfort since 1970 was indicated in October 1995 reports from the Levi Hospital. R. at 1131. X-rays of the appellant's right knee revealed a normal appearing joint, without bone changes or excess fluid. R. at 1129. A November 1995 evaluation provided a diagnosis of polyarthralgias, probably secondary to previous sarcoidosis. R. at 1127-28. The appellant was scheduled for a VA examination in January 1996, to which he failed to report. Despite the appellant's failure to report for the examination, the examining physician reviewed the appellant's claims folder and provided comments concerning entitlement to service connection. R. at 1136. The examiner noted a history of sarcoid based on biopsies of the appellant's liver and lymph nodes. *Id.* He opined that the appellant's knee complaints and low back pain were compatible with, but not diagnostic of, sarcoid arthropathy. *Id.* He explained that a diagnosis of sarcoid was not exact even with a biopsy. *Id.* He clarified that this was the reason that physicians were

using the terms "presumably" and "compatible with." *Id.* The examiner observed that the appellant had never had a biopsy of the knee which would be required to "rule out or rule in this diagnosis." *Id.*

On June 3, 1996, the Court dismissed the appeal for lack of jurisdiction with respect to the still pending claim for service connection for sarcoidosis, and with respect to the CUE claim in the prior BVA decisions. R. at 1142-43. An SSOC was issued in June 1996 continuing the denial of service connection for sarcoid arthritis of the knees. R. at 1145-47. On June 24, 1996, the appellant filed an NOD. The appeal was recertified to the Board on June 27, 1996. R. at 1156. In June 1997, the BVA requested an opinion from an independent medical expert who was a specialist in rheumatology. R. at 1158, 1160-62. Dr. Mark Burns, a specialist in rheumatology at the Montefiore Medical Center, was asked to thoroughly review the appellant's record and "provide an opinion as to whether it is at least as likely as not that the veteran has sarcoid arthritis of the knees, and, if so, is it at least as likely as not that the knee problems in service were the initial manifestations of the sarcoidosis." R. at 1161. Dr. Burns indicated that he was a board-certified rheumatologist and that he had reviewed the appellant's claims file and associated medical records. R. at 1164. Dr. Burns framed the issue under review as "whether knee pain that [the appellant] experienced while on active on duty until 7/71 was related to a diagnosis of sarcoidosis

made in 1978." *Id.* He explained that he would confine his remarks "to the period prior to the time of the establishment of a diagnosis of sarcoidosis in 1978." *Id.* Dr. Burns stated that by 1977 symptoms of sarcoid were emerging and that the bone scan findings were evidence of sarcoid arthritis. R. at 1165. He noted that there were a number of potential causes of knee pain in a 22-year-old subjected to the physical stresses of being a soldier. *Id.* He stated that he did "not know for sure what was the cause of the knee pain [the appellant] had while on active duty." *Id.* He remarked that "the probability that the knee pain in 1971 was due to chronic sarcoid arthritis was very low." *Id.* He opined that "[b]ony involvement from sarcoid and acute sarcoid arthritis are untenable diagnos[es]...[c]hronic sarcoid arthritis was unlikely to have [] been present from 1970-1976 without other signs of sarcoid and without X-ray changes." *Id.* He further opined that he did not believe that sarcoid arthritis was likely to be the cause of the appellant's knee pain from 1970-71 and that the evidence did not "point to the presence of sarcoid and [its] associated arthritis until 1976." *Id.*

In its September 29, 1997, decision, the Board determined that the appellant's claim was well grounded. R. at 4. After an extensive review and discussion of the medical evidence of record, the Board found that a preponderance of the evidence was against entitlement to service connection for sarcoidosis of the knees. R. at 3-4. The Board stated that "although several physicians have

attributed [the appellant's] knee pain to sarcoidosis, none of the physicians have specifically found that [the appellant's] knee pain in service was due to sarcoidosis." R. at 10. This appeal followed.

II.ANALYSIS

A. Service Connection for Sarcoidosis of the Knees

Establishing service connection generally requires medical evidence of a current disability, *see Rabideau v. Derwinski*, 2 Vet.App. 141 (1992); medical or, in certain *circumstances*, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *see also Heuer v. Brown*, 7 Vet.App. 379, 384 (1995); *Grottveit v. Brown*, 5 Vet.App. 91 (193). When a disease was first diagnosed after service, entitlement to service connection may be established by evidence demonstrating that the disease was in fact "incurred" during the veteran's service. *See* 38 C.F.R. § 3.303(d) (1994); *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994); *Cosman v. Principi*, 3 Vet.App. 503, 505 (1992); *Godfrey v. Derwinski*, 2 Vet.App. 352, 356 (1992). Alternatively, service connection may be established under § 3.303(b) by evidence of (I) the existence of a chronic disease in service or during an applicable presumption period and (ii) present manifestations of the same chronic disease. *See* 38 U.S.C. §

112(a)(1); 38 C.F.R. § 3.303(b), 3.307(a), 3.309(a)(1997); *Savage v. Gober,* 10 Vet.App. 488, 495 (1997). The presumptive period for sarcoidosis is one year. *See* 38 U.S. C. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309.

The BVA's determination of whether or not service connection is appropriate in a particular case is a finding of fact. *Irby v. Brown*, 6 Vet.App. 132, 135 (1994); *Swann v. Brown*, 5 Vet.App. 229, 232 (1993); *Wood v. Derwinski,* 1 Vet.App. 190, 192 (1991). The Court must affirm findings of fact made by the Board unless they are found to be "clearly erroneous." 38 U.S.C. § 7261(a)(4). "[T]his court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the BVA...we cannot overturn them." *Gilbert v. Derwinski,* 1 Vet.App. 49, 53 (1990). In addition, as set forth in 38 U.S.C. § 7104 (d)(1), the BVA is required to adequately provide reasons or bases for its findings and conclusions on all material issues of fact or law. *See Gilbert,* 1 Vet.App. At 56-57.

The appellant contends that his current knee pain, which has been diagnosed in service as bilateral chondromalacia patellae and later diagnosed by the Board as degenerative arthritis, is sarcoid arthritis which was caused by sarcoidosis. Appellant's Brief (Br.) at 8. The appellant further argues that his knee pain, which commenced while he was in service, "was an early manifestation of his sarcoidosis for which he is now totally and permanently

disabled, but non-service connected." *Id.* The appellant supports his contention by stating that "there is considerable evidence of record to supuport an award of benefits to the appellant for sarcoid arthritis, including the medical report of Dr. Ramond P. Miller ([R. at] 456), but the appellee has simply refused to give 'reasons and bases' for disregarding all of the evidence submitted of record for the appellant that supports his claims for disability due to sarcoid arthritis." Appellant's Br. at 11. The appellant also states that the Board failed to give the appellant the benefit of the doubt and "failed to give reasons or bases for not according the weight to the evidence, which established sarcoid arthritis of [the] appellant's knees." *Id.*

It is the Board's responsibility, not the Court's, to assess the credibility and weight to be given to evidence. *See Evans v. West,* 12 Vet.App. 22, 30 (1998); *Owens v. Brown,* 7 Vet.App. 429, 433 (1995). "It is the Board that must assess the credibility and probative value of evidence, and provided that it offers an adequate statement of reasons and bases, the Board may favor one medical opinion over another." *Evans* 12 Vet.App. At 30. While the Board is not required to accept a medical authority supporting a claim, it must provide its reasons for rejecting such evidence and, it must provide a medical basis other than its own unsubstantiated conclusions to support its ultimate decision. *Colvin v. Derwinski,* 1 Vet.App. 171, 175 (1991); *see also Allday v. Brown*, 7 Vet.App. 517 (1995) ("Board must

analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive and unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran"); *Simon v. Derwinski,* 2 Vet.App. 621, 622 (1992)(BVA is not required to accept examining physicians' findings but it must state reasons or bases for conclusions to the contrary and point to medical bases for its decision other than its own).

In June 1997, the Board sought an independent medical opinion from Dr. Burns, a specialist in rheumatology. R. at 1160-62. The Board reasoned that there were already medical opinions of record "both supporting and refuting the veteran's contention" that "the diagnosis of degenerative joint disease was incorrect and that, instead, he had sarcoid-related arthritis or arthralgia." R. at 1161. In reaching its decision, the Board extensively reviewed and discussed the medical evidence of record incluidng the medical evidence supporting the appellant's claim and the statement of Dr. Miller. In the end, the Board gave particular weight to the independent medical opinion rendered by Dr. Burns, who stated that the appellant's in-service knee pain was not due to sarcoidosis and that no medical nexus existed between the appellant's period of service and the sarcoidosis which was first diagnosed in 1976. R. at 4-11. Further, the Board found persuasive Dr. Burns detailed description of the different musculoskeletal manifestation associated with sarcoidosis and his conclusion

that the appellant had failed to exhibit any of these manisfestations for many years following his separation from service. R. at 11. While the Board recognized that "the majority of the evidence indicates that the veteran's current knee problems *are* associated with sarcoidosis," the Board found that none of the medical professionals had attributed the appellant's pre-1977 knee complaints to sarcoidosis, nor had they suggested that the appellant had sarcoidosis earlier than 1977. R. at 10-11. Although the appellant might now opine to this effect, his opinion is not competent to link his current condition to his knee problems in service. *See Savage and Caluza, both supra.* Additionally, the Board found that the AFIP, the VA examiner in January 1996, and Dr. Burns had specifically determined that the appellant "did not have sarcoidosis until, at the earliest, 1977." R. at 11. Upon reviewing all of the evidence of record, the Board ultimately decided that the preponderance of the evidence was against the appellant's claim in the absence of any evidence of sarcoidosis during service or within the presumptive period and in the absence of any medical evidence relating the appellant's in-service knee problems to sarcoidosis or otherwise attributing sarcoidosis to service. *Id.* The Court concludes that there is a plausible basis in the record for the Board's decision, and that the decision is supported by adequate reasons and bases and is not clearly erroneous.

B. Benefit of the Doubt

The appellant further argues that he was not afforded the benefit of the doubt by the Board. A veteran is afforded the benefit of the doubt in resolving an issue "[w]hen, after consideration of all evidence and material of record, in a case before [VA] with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding merits of an issue material to the determination of the matter." 38 U.S.C. § 5107(b). Where there is a properly supported and reasoned conclusion that a fair preponderance of the evidence is against the claim, the possibility of the evidence being in "an approximate balance" is precluded. *Bucklinger v. Brown,* 5 Vet.App. 435, 439 (1993); *Gilbert,* 1 Vet.App. At 58. Nonetheless, when there is significant evidence in support of a claim, "the Board must provide a satisfactory explanation as to why the evidence was not in equipoise." *Ashley v. Brown,* 6 Vet.App. 52, 59 (1993) (quoting *Williams v. Brown,* 4 Vet.App. 270, 273-74 (1993)).

In this case, the Board denied the appellant's claim on the merits. That is, the Board found that the evidence preponderated against the claim. *Alemany v. Brown,* 9 Vet. App. 518, 519 (1996). The Court has concluded above that there is a plausible basis in the record for the Board's determination that the preponderance of the evidence was against the appellant's claim and that this determination is not clearly erroneous. The Board did recognize that the

majority of the evidence showed that the appellant's current knee problems were related to sarcoidosis. Assuming that this evidence was "significant evidence" in support of the appellant's claim, the Court is satisfied that the Board explained the reasons supporting its decision, including the reasons for the Board's rejection of this evidence. Accordingly, the benefit of the doubt doctrine is inapplicable. *Hayes v. Brown,* 5 Vet.App. 60, 69-70 (1993) ("if a fair preponderance of the evidence is against the veteran's claim, the claim will be denied, and the [benefit of the doubt] rule has no application").

C. CUE Claim

In addition, the appellant appears to argue that there was CUE in prior decisions and therefore, the decisions should be reversed or amended. Appellant's Br. at 10. The Court notes that in June 1996 it declined to review the appellant's claim of CUE in the 1978, 1982, 1986 and 1989 Board decisions, explaining that CUE review authority relates only to review of RO decisions and not those of the Board. R. at 1142. Public Law No. 105-111, 111 Stat 2271 (1997), codified at section 7111 of title 38 of the U.S. Code, now permits CUE challenges to BVA decisions. "Judicial review of BVA decision denying a claim of CUE in an earlier BVA decision would then be available." *Dittrich v. West,* 11 Vet.App. 10, 11. *aff'd,* 163 F.3d 1349 (Fed. Cir. 1998).

In its September 29, 1997, decision, the Board

recognized that it had previously denied the appellant's claim of CUE in its September 1995 decision as lacking legal merit and that the appellant had appealed this decision. R. at 3, 1111. The Board also noted that this Court had dismissed the appellant's appeal as to the CUE issue in June 1996. R. at 3. Nevertheless, the Board made no determination in the BVA decision now appealed on the issue of CUE in prior BVA decisions. Although Public Law No. 105-111, and section 7111 may have made the prior Board decisions, specifically the 1978, 1982, 1986, and 1989 decisions, subject to a CUE claim, a BVA decision on such a claim is not before this Court. *See Dittrich,* 11 Vet. App. at 12.

III.CONCLUSION

Single-judge disposition is appropriate when, as here, the issue is of relative simplicity and the outcome is not reasonably debaable. *See Frankel v. Derwinski,* 1 Vet. App. 23, 25-26 (1990). Upon consideration of the above, the Court holds that the appellant has not demonstrated that the BVA committed either factual or legal error that requires reversal or remand. *See* 38 U.S.C. §§ 5107, 7104(d), 7261; *Gilbert,* 1 Vet.App. at 52-53. The September 29, 1997, BVA decision which denied the appellant's claim for service connection for sarcoidosis of the knees is AFFIRMED.

DATED FEB 22, 1999

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

99-7100

ALBERT MORGAN, JR.,

Claimant-Appellant,

v.

TOGO D. WEST, JR.,

Secretary of Veterans Affairs,

Respondent-Appellee.

ON MOTION

Before MAYER, Chief Judge, NEWMAN and MICHEL, Circuit Judges. MICHEL, Circuit Judge.

ORDER

Albert Morgan, Jr. moves for reconsideration of this court's November 2, 1999 order granting the Secretary's motion to dismiss for lack of jurisdiction. The Secretary has not responded.

Upon consideration thereof,

IT IS ORDERED THAT:

Morgan's motion for reconsideration is denied.

BOARD OF VETERANS' APPEALS
Department of Veterans Affairs
Washington, DC 20420

IN THE APPEAL OF C 27 024 464
ALBERT MORGAN, JR.

DOCKET NO. 91-12 657) DATE SEP 29, 1997
)
)

On appeal from the
Department of Veterans Affairs Regional Office in No.
Little Rock, Arkansas

THE ISSUE

Entitlement to service connection for sarcoidosis of the knees.

REPRESENTATION

Appellant represented by: Bennie O'Neil, Attorney

ATTORNEY FOR THE BOARD

James L. March, Counsel

IN THE APPEAL OF C 27 024 464
ALBERT MORGAN, JR.

INTRODUCTION

The veteran had active service from July 1969 to July 1971. This matter comes to the Board of Veterans' Appeals (Board) from a September 1990 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in North Little Rock, Arkansas.

A VA examination was conducted in October 1973; the diagnosis was degenerative joint disease of the knees. In November 1973, the RO granted service connection for degenerative joint disease of the knees and assigned a noncompensable evaluation. In April 1978, the RO denied entitlement to service connection for sarcoidosis. The veteran appealed the April 1978 decision, and, in December 1978, the Board denied service connection for sarcoidosis. In November 1982, the Board again denied service connection for sarcoidosis. In decisions of May 1986 and October 1989, the Board found that new and material evidence had not been submitted and declined to reopen the veteran's claim for service connection for sarcoidosis. The veteran appealed the Board's October 1989 decision, but in April 1990, the United States Court of Veterans Appeals

(Court) dismissed the appeal for lack of jurisdiction.

In April 1990, the veteran again filed a claim requesting that his service-connected degenerative arthritis be changed to sarcoidosis. In September 1990, the RO denied the veteran's claim, and he appealed. In September 1991, the Board found that the evidence submitted since October 1989 Board decision was not new and material and declined to reopen the veteran's claim; the veteran appealed to the Court.

In an April 1993 memorandum decision, the Court noted that the parties had agreed that inaccurate information was before the RO and the Board at the time of their decisions. Thus, the Court remanded the case for additional proceedings. In September 1993 the Board remanded the case for further development.

In a November 1993 rating decision, the RO again found that new and material evidence had not been submitted, and declined to reopen the claim. In addition, the RO found that the prior denials of service connection for sarcoidosis were not clearly and unmistakably erroneous.

In September 1995, the Board denied the veteran's claim of clear and unmistakable error; however, the Board held that new and material evidence had been submitted, and the

claim of entitlement to service connection for sarcoidosis of the knees was reopened. The Board remanded the issue to the RO for additional development as well as a *de novo* review of the claim. The veteran appealed the finding of no clear and unmistakable error. In June 1996 order, the Court affirmed the Board's decision and dismissed the veteran's appeal.

CONTENTIONS OF APPELLANT ON APPEAL

The veteran contends, in essence, that he has had sarcoidosis since service. He argues that although he has granted service connection for degenerative joint disease of the knees, that diagnosis was erroneous. He states that his knee pain during and since service was the first manifestation of the sarcoidosis.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C. A. § 7104 (West 1991 & Supp. 1997), has reviewed and considered all of the evidence and material of record in the veteran's claims files. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the preponderance

of the evidence is against entitlement to service connection for sarcoidosis of the knees.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable disposition of the appeal has been obtained.

2. Sarcoidosis was not shown in service or for several years thereafter.

3. The veteran's knee pain in service was not due to sarcoidosis.

CONCLUSION OF LAW

Sarcoidosis of the knees was not incurred in or aggravated by service. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 5107 (West 1991); 38 C.F.R. §§ 3.303, 3.307, 3.309 (1996).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Board finds that the appellant's claim is plausible and capable of substantiation, and thus well grounded within the

meaning of 38 U.S.C.A. § 5107(a). When an appellant submits a well-grounded claim, VA must assist him in developing facts pertinent to those claims. 38 U.S.C.A. § 5107(a). The Board is satisfied that all relevant evidence has been obtained regarding the appellant's claim, and that no further assistance to the appellant is required to comply with 38 U.S.C.A. § 5107(a).

Service connection may be established for disability resulting from person injury suffered or disease contracted in line of duty, or for aggravation of a pre-existing injury suffered or disease contraced in line of duty. 38 U.S.C. A. § 1110; 38 C.F.R. § 3.303. Regulations also provide that service connection may be granted for any disease diagnosed after discharge when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d). If the disorder is a chronic disease, service connection may be granted if manifest to a degree of 10 percent within the presumptive period; the presumptive period for sarcoidosis is one year. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309.

Service medical records reveal periodic complaints of knee pain, which were generally attributed to chondromalacia. Although X-ray studies had shown slight degenerative changes in both knees, the service medical records were negative for clinical or laboratory signs of sarcoidosis.

When examined by VA in October 1971, the orthopedic diagnosis was possible chondromalacia of the patellae, which was not felt to be substantiated on X-ray or clinical examination. No clincial or laboratory signs of sarcoidosis were noted; a chest X-ray was normal. Medical evidence thereafter shows that the veteran was treated or hospitalized on a number of occasions for a variety of complaints, which included a fever of undetermined origin, arthralgias involving both knees and the back, and recurrent episodes of fever, myalgia, and general lethargy. On orthopedic consultation by VA in May 1973, the impression was chondromalacia, but X-rays of the knees at the time were normal. When seen at a VA orthopedic clinic for evaluation for rating purposes in August 1976, an examination culminated in a diagnosis of no orthopedic disease. X-rays of the knees showed no significant abnormality.

When the veteran was hospitalized at a private facility in July 1977, a bone scan was consistent with arthritis. When he was hospitalized at a VA facility in August and September 1977, an extensive workup, which included bone and liver biopsies, was undertaken, and the discharge diagnoses were recurrent fever and arthralgias, probably tuberculosis. It was noted, however, that the veteran would be observed further for the possibility of sarcoidosis. Hospitalizations by VA in October 1977 and March 1978

resulted in diagnoses suggsting the possibility of sarcoidosis. The 1978 VA hospital summary shows a discharge diagnosis of granulomatous hepatitis, tuberculosis versus sarcoid. The record shows medical treatment thereafter for the veteran's granulomatous disease, but this evidence shows only its progression, not its etiology.

When the veteran was hospitalized by VA in March 1978, a liver biopsy contained findings consistent with granulomatous hepatitis, of uncertain etiology, probably sarcoidosis in nature. A March 1979 VA examination revealed a complete range of motion of both knees, although the veteran did complain of some parapatellar discomfort. There was no effusion, redness or thickening about the knee joints.

The veteran's history of sarcoidosis was noted, but the examiner did not discuss any relationships between sarcoidosis and the veteran's knee complaints in service.

When the veteran was examined by VA in January 1980, sarcoidosis with symptoms of weakness and multiple joint pain was diagnosed, based on a history of biopsies of the liver and of a neck lymph node that showed typical changes of sarcoid. The diagnoses also included arthralgia affecting multiple joints, apparently secondary to sarcoidosis. X-ray studies of multiple joints, however, were normal.

An April 1980 note from Robert B. Lewis, M.D., Chief of the Rheumatology Section at the VA Medical Center in Little Rock, Arkansas, indicates that he saw the veteran in September 1979. The veteran had complained of back and knee pain. He noted that at the time, both complaints were most likely due to underlying sarcoidosis.

In May 1980, a VA staff physician, after reviewing the claims folder, indicated that the veteran's knee complaints were "on the basis of sarcoidosis." the following month, however, a VA orthopedic examiner found no evidence of involvement of the knees as a result of sarcoidosis or any other disease process.

A memorandum dated in July 1980 from VA orthopedist, David C. Barnett, M.D., indicates that he reviewed the veteran's chart from the fall of 1979. It was noted that examination of the veteran had no positive findings. A bone scan, however, was compatible with his previous diagnosis of sarcoidosis with joint involvement.

In a September 1980 letter, a private orthoopedist, Thomas P. Rooney, M.D., noted that an examination of the veteran's knees revealed no abnormalities. There was no increased temperature or swelling present, and there was full range of motion. He opined, however, that the joint pains could be manifestation of his sarcoidosis, and that it was probably

related.

An opinion from the Armed Forces Institute of Pathology (AFIP) in November 1981 indicated that AFIP was unable to substantiate a relationship between the veteran's chronic joint symptoms and his sarcoidosis and agreed with the June 1980 opinion of the VA orthopedic examiner. To render a more definitive opinion, AFIP requested the opportunity to review all available X-rays and bone scans. In August 1982, AFIP reported that the veteran's chest X-rays dated in May 1969 and July 1971 had been reviewed and that no evidence of sarcoidosis was visualized in the submitted fimls. AFIP indicated a continuing interest in reviewing the bone scans and radiographs of the veteran's hands and feet. AFIP was of the opinion that the veteran's sarcoidosis was first documented in 1978.

In December 1982, a VA examination was conducted. The examiner reviewed the veteran's records. The veteran reported that he had never had any redness, swelling, increase in heat, or restriction of motin of the knees. He did, however, complain of pain. The examiner opined that the evidence did not support a diagnosis of sarcoidosis and/or osteoarthritis or degenerative arthritis of his knees in that there were no radiographic changes or other findings of sarcoid involving the joints.

A letter received from E.J. Towbin, M.D., Chief of Staff of the Little Rock, Arkansas, VA Medical Center. Dr. Towbin explained to the veteran the difference between X-ray findings of degenerative changes and a clinical diagnosis of degenerative arthritis. He also noted that there had been no definite evidence of sarcoidosis.

In a May 1986 statement, Harold B. Betton, M.D., reported that the veteran had been his patient for quite some time and that he first evaluated him in 1983 for sarcoidosis and joint pain. Dr. Betton noted that he had reviewed the veteran's records from a variety of physicians and other VA records in the file and was of the opinion that he still had problems with his knees and that these problems were linked to sarcoidosis. Dr. Betton was further of the opinion that sarcoidosis was the etiology of the veteran's arthritis. In November 1987, Stewart Leibowitz, M.D., a private rheumatologits, rendered an opinion that the arthralgias and arthritis of the knees in the veteran's case may be secondary to his diagnosis of sarcoidosis, although it was felt that it was impossible to prove this for certain.

Reports from Levi Hospital dated in October 1995 reveal pertinent impressions of polyarthralgia, history of sarcoidosis, and chronic lmbar pain. X-rays of the right knee were normal. There were no bone changes and no excess fluid in the joint. A November 1995 report from P.

Ross Bandy, M.D. shows a diagnosis of polyarthralgias probably secondary to previous sarcoidosis. A November 1995 letter from Dr. Bandy reflects his opinion that the veteran's polyarthralgias were due to his sarcoidosis.

A VA examination was scheduled for January 1996, but the veteran failed to report for the examination. The scheduled examiner, however, reviewed the veteran's claims folder and provided comments concerning the veteran's claim. He noted that the veteran had a history of sarcoid, based on biopsies of the liver and lymph nodes. He pointed out that the veteran also began to complain of knee and low back pain compatible with but not diagnostic of sarcoid arthropoathy. The physician noted that there were so many physicians saying "presumably" and "compatible with." Further, it was noted that the veteran never had a biopsy of the knee to see if the histology is compatible with the diagnosis.

In June 1997, the Board requested an opinion of an independent medical expert. Later that month a report was received from Mark R. Burns, M.D., of the Division of Rheumatology, Department of Medicine, of the Montefiore Medical Center. He noted that he was a board-certified rheumatologist and that he had reviewed the veteran's record. It was noted that the veteran began to complain of knee pain in July 1970. Dr. Burns reported that the October

1971 examination revealed no other symptoms and that findings on the physical examination were normal except for slight knee tenderness. The diagnosis at that time was probable chondromalacia patellae, although osteoarthritis was also diagnosed, based on purported X-ray findings.

Dr. Burns reviewed the examination reports from the period between 1971 and the fall of 1976, when the veteran started having the diffuse myalgias and arthralgias as well as the fevers and other manifestations of sarcoid. He stated that there was no documentation of any complaints compatible with sarcoid, other than knee pain, during ths period. Specifically, he noted that repeated knee examinations—1973 and 1975—revealed no inflammatory signs. Further, the chest and knee X-rays in October 1973 and August 1976 were also normal.

Regarding the radiologic studies, Dr. Burns pointed out that the veteran's initial knee X-rays did not show significant osteoarthritis. This fact, he noted, had little impact on the case—except that it clouded the issue as to the cause of the veteran's knee pain in 1971. In addition, X-rays done in 1976 did not show osteoarthritis; thus, he concluded that it was not likely that it existed in 1971. Dr. Burns noted that the bone scan of July 1977 was compatible with arthritis but in no way diagnostic of sarcoid arthritis. He stated that a bone scan was not able to distinguish diagnostically among

a wide variety of arthritides, although certain patterns of uptake on the scan would point to certain types of arthritis. The scan had to be correlated with other information. Dr. Burns concluded that by 1977, the symptoms of sarcoid were emergine, and the bone scan findings were evidence of sarcoid arthritis. This, however, did not help to address the issue of whether the knee pain in 1971 was from sarcoid.

Dr. Burns noted that there were a number of potential causes of knee pain in a 22-year old subjected to the physical stresses of being a soldier. Ther were soft-tissue problems, as well as such problems as chondromalacia and internal derangements of the knee.

Dr. Burns pointed out that there were a number of musculoskeletal manifestations of sarcoid, of which three were of potential interest here. One was bone involvement, which would be diagnosed by X-ray. The persistently normal X-rays, however, did not give evidence of this. Next, he noted that sarcoid could also prsent as acute sarcoid arthritis with arthritis and/or soft-tissue inflammation around joints. This, he described, was often associated with skin rashes and virtually always with a positive CXR; the prsence of sarcoid would be established either immediately or shortly thereafter. No inflammation had ever been demonstrated on physical, and the rest of the picture was not present here.

The third manifestation discussed by Dr. Burns was a chronic sarcoid arthritis, which could involve one or many joints. He noted that it was diagnosed clinically in a patient with obvious sarcoid, or could be diagnosed by biopsy. X-rays usually showed some combination of findings compatible with a chronic destructive arthritis. The veteran, however, had normal X-rays as late as 1976. Dr. Burns stated that it would be unusual for a patient with chronic sarcoid arthritis to have persistent joint symptoms for at least six years (i.e., 1970-1976) with no X-ray changes. He also pointed out that during this period, no inflammatory signs were noted in the knee, and there were no other signs of sarcoid. Therefor, he concluded that the probability that the knee pain in 1971 was due to chronic sarcoid arthritis was very low.

Dr. Burns stated that he was uncertain of the cause of the veteran's knee pain during active duty. MRI's were not yet available at that time, and they are by far the best imaging procedures for soft-tissue problems and internal derangements. He found that bony involvement from sarcoid and acute sarcoid arthritis were untenable diagnoses here. Further, he noted that chronic sarcoid arthritis was unlikely to have been present from 1970 to 1976 without other signs of sarcoid and without X-ray changes.

He concluded that he did not believe that sarcoid arthritis

was likely to be the cause of the veteran's knee pain from 1970 to 1971. The available evidence did not point to the presence of sarcoid and its associated arthritis until 1976.

The Board finds that the preponderance of the evidence is against the veteran's claim. Although several physicians have attributed his knee pain to sarcoidosis, none of the physicians have specifically found that the veteran's knee pain in service was due to sarcoidosis. The Board concedes that the veteran had obvious knee pain in service. The cause of the in-service pain, however, has not been determined—although the veteran has been receiving disability compensation for degenerative joint disease of the knees. The first evidence of sarcoidosis was in 1977, six years after the veteran's period of service.

There is a difference of opinion among the medical professionals in this case as to whether the veteran's post-1977 knee complaints were due to sarcoidosis. In fact, the majority of the evidence indicates that the veteran's current knee problems *are* associated with sarcoidosis. Not one medical professional, however, has attributed the veteran's pre-1977 knee complaints to sarcoidosis. Further, no medical professionals have suggested that the veteran had sarcoidosis earlier than 1977. Indeed, AFIP, the January 1966 VA examiner, and Dr. Burns specifically determined that the veteran did not have sarcoidosis until, a the earliest,

1977. Most persuasive was the opinion of Dr. Burns, who described the different musculoskeletal manifestations associated with sarcoidosis and pointed out that the veteran had none of those manifestations for many years following service.

In the absence of evidence of sarcoidosis during service or within one year of the veteran's separation therefrom, and in the absence of any medical evidence attributing the veteran's knee problems in service to sarcoidosis or otherwise attributing sarcoidosis to service, the Board finds that the preponderance of the evidence is against the veteran's claim of entitlement to service connection for sarcoidosis of the knees.

ORDER

Service connection for sarcoidosis of the knees is denied.

BENNIE O'NEIL
Attorney and Counselor at Law
2300 Arkansas Avenue
North Little Rock, Arkansas 72114
Phone: 945-5157

June 24, 1996

Mr. Donald D. Iddings
Adjudication Officer
Department of Veterans Affairs
VA Regional Office
Building 65, Fort Roots
P.O. Box 1280
North Little Rock, Arkansas 72115

Re: 350/211c
27 024 464
Albert Morgan, Jr.
8 Howell Drive
Little Rock, Arkansas 72204-2303

Dear Mr. Iddings:

We disagree with the decision rendered by you on June 14, 1996. We are asking that you forward on to the Board of Veteran's Appeals your decision for review immediately.

We disagree with your decision for the following reasons:

1. The Veterans Administration is committing error because it has classified the veterans' condition as degenerative arthritis, and that is a condition that the veterans does not have, as evidenced by medical reports in the record.

2. There is no physician in the record who has diagnosed that the veteran has degenerative arthritis of both knees.

3. Both VA and private physician state that x-rays of veteran's knees are normal.

4. Dr. Charles McKenzie, a VA physician states in his medical report dated December 20, 1982 that x-rays of both of veterans' knees do not show evidence of degenerative arthritis.

5. VA and private physicians records state that the appellant's service connected joint pain that began while in the military service was an early manifestation of sarcoidosis that was diagnosed after military service.

6. Appellant's total and permanent sarcoidosis disability is secondary to his service connected arthritis disability of both knees.

7. The VA committed obvious error in its May 27, 1983 decision when it classified the 10 percent service connected arthritis disability that was approved by it in accordance with the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 as being degenerative arthritis that they claimed could be seen on x-rays of both knees, instead of sarcoid arthritis that can actually be seen on bone scan films of both knees.

8. It is mandated in the VA Schedule Rating 38 C.F.R. Part 4 Diagnostic Code 5003 that the appellant be granted no less than a 10 percent rating for arthritis of both-knees because there is medical evidence in the appellant's VA record that the arthritis can be medically seen in both knees.

8. Finally, appellant contends that he had sarcoid arthritis which developed while he was in the military and rendered him totally and permanently disabled on March 6, 1980.

For the reasons stated, the decision of the VA Regional Office should be reversed, and a decision should be entered reflecting that the appellant has sarcoid arthritis that started while he was in the military and rendered him totally and permanently disabled on March 6, 1980.

Sincerely,

Bennie O'Neil

cc: Mr. Albert Morgan, Jr.

RATING DECISION

File: C-27 024 464

Date of Claim: 9/17/79
Date of Last Examination: 1/8/80
Sex: Male Branch: Army
EOD: 7-11-69 RAD: 7-12-71
Date of Birth: 11/20/49
Competency: Competent or not an issue
No. of S/C Disab. (0 through 9) (9 to show 9 or more): 1
Physical Exam: Mo. 1, Yr. 82, Reason: 01
Date of this Rating: 3/6/80

Narrative:

VAR 1156

J. Appeal.

I. Increased evaluation for service connected degenerative joint disease of the knees, service connection for sarcoidosis; PTNSC.

F. The Board of Veterans Appeals has upheld the decision denying service connection for sarcoidosis and no evidence has been received to show service incurrence of this disability. X-ray of the knees done

7/27/79 was within normal limits. On current VA examination, no abnormalities were seen by x-ray. There was considerable limitation of motion due to pain and review of the file reveals constant complaint of pain since 10/5/77, becoming progressively severe. Previous liver and lymph biopsies have yielded a diagnosis of sarcoidosis. Marked muscular spasm has been seen in the past and more of the major joints are involved. The veteran is 30 years old and last worked on 12/15/78, as a nursing assistant.

D. VA examination conducted 1/8/80 is considered NEW AND MATERIAL EVIDENCE.

	1. SC (VE INC)
5260	Degenerative Joint Disease, Knees
	0% from 6/11/73
	8. NSC VE
5099-5009	60% Sarcoid Arthralgia
6799-6802	30% Sarcoidosis
	2. PT VE from 12/16/78
COMB	SC 0%
	NSC 70%

C-27 024 464
MORGAN, Albert, Jr.

SUMMARY OF EVIDENCE AND ADJUDICATION ACTIONS:

Additional evidence and adjudication actions are shown on the Statement of the Case dated May 4, 1979, and the Supplemental Statement of the Case dated October 10, 1979.

10/29/79: VAMC outpatient treatment reports are received and an official VA examination is ordered.

1/29/80: VA examination conducted 1/8/80 is received showing no abnormalities on X-ray. There was considerable limitation of motion due to pain and the complaint of pain has been constant since October 5, 1977, becoming progressively severe. Marked muscular spasm has been seen in the past and most of the major joints are involved.

3/6/80: Rating Decision determines the veteran to be permanently and totally disabled due to his nonservice-connected disabilities from 12/16/78 and also confirms and continues the zero percent evaluation for degenerative joint disease of the knees and the denial of service connection for

sarcoidosis and related sarcoid arthralgia.

PERTINENT LAWS: CFR PROVISIONS:

Pertinent laws previously furnished continue to be applicable.

DECISIONS:

1. Increased evaluation for degenerative joint disease of the knees is not established.

2. Service connection for sarcoidosis is not established.

3. Entitlement to pension benefits is established.

REASONS FOR DECISION:

1. Increased severity of the service connected knee condition is not shown.

2. There has been no new evidence submitted to show that the veteran's degenerative joint disease of the knees was an early manifestation of sarcoidosis, and sarcoidosis was not incurred or aggravated by military service.

3. The medical evidence establishes that the veteran has been permanently and totally disabled since December 16, 1978, due to his nonservice-connected disabilities.

IN THE APPEAL OF
ALBERT MORGAN, JR. C 27 024 464

BOARD OF VETERANS APPEALS
WASHINGTON, DC 20420

FINDINGS AND	)	
DECISION	)	DOCKET NO. 80-29 153
	)	
	)	DATE: May 27, 1983

THE ISSUE

Entitlement to an increased (compensable) rating for bilateral knee disability, classified for rating purposes as degenerative joint disease.

REPRESENTATION

Appellant represented by: Bennie O'Neil, Attorney

WITNESS AT HEARING ON APPEAL

Albert Morgan, Jr., appellant

CONSULTATIONS BY THE BOARD

Daniel J. Stein, Staff Legal Advisor

ACTIONS LEADING TO PRESENT APPELLATE STATUS

A claim for Veterans Administration monetary benefits has been pending for a number of years. The principal claim pursued by the veteran was entitlement to service connection for sarcoidosis. This issue was the subject of several Board decisions until it was finally adjudicated, and the claim disallowed, by a decision issued in November 1982. By that same decision, a final decision on the issue of an increased rating for the veteran's service-connected bilateral knee disability was deferred pending a reexamination performed by the Veterans Administration. This reexamination was performed and the case has since been returned to the Board for final appellate consideration of the stated issue.

Although the claim has been pending for several years, much of the evidence of record relates to sarcoidosis and/or the origin of the veteran's knee disability. Since the issue of an increased rating relates primarily to the current severity of the service-connected condition the Board will not refer to that evidence which is not directly pertinent to the sole issue to be decided at this time. It is, however, noted that the reports of prior clinical records, including Veterans Administration compensation examinations conducted in March 1979 and January 1980, have been reviewed by the

Board and considered in the disposition of the instant claim. It is also noted that, in pursuing his claim for service connection for sarcoidosis, the veteran (and his representative) has denied that he, in fact, manifests degenerative joint disease of the knees. However, since the clinical evidence establishes that this disease is, in fact, present and since the veteran apparently still seeks compensation, the current claim will be decided under the diagnostic criteria pertinent to that disease.

CONTENTIONS

It is contended by and on behalf of the veteran that he is entitled to increased compensation for his bilateral knee disability. The veteran's principal problem with his knees consists of constant pain which has gotten worse over the years.

THE EVIDENCE

The veteran served on active duty from July 1969 to July 1971. His only adjudicated service-connected disability is degenerative joint disease of the knees.

Clinical reports for the past several years show extensive treatment of the veteran for a variety of medical problems. The medical reports show persistent complaints of knee pain without significant limitation of knee function.

A Veterans Administration orthopedic examination was conducted in December 1982. The veteran complained of pain in the knees. He did not related to the examiner that he had experienced redness, swelling, or an increase in heat or restriction of motion of the knees. On physical examination he could achieve a full range of knee motion and there was no effusion, swelling or redness. The patellae were stable. At one point in the course of the examination there was noted to be tenderness along the superomedial border of the right patella. There was no evidence of instability.

Radiographic studies of the knees were interpreted by the radiologist as showing some spurring of the tibial spines indicating a very mild degree of degenerative changes. There was no other significant abnormality. Th eorthopedist interpreted X-rays as not showing evidence of osteo or degenerative arthritis.

THE LAW AND REGULATIONS

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. Part 4). Separate diagnostic codes identify the various disabilities.

Degenerative arthritis established by X-ray findings will be rated on the basis of limitation of motion under appropriate

diagnostic codes for the specific joint involved. In the absence of limitation of motion, a ten percent (10%) evaluation is provided with X-ray evidence of involvement of two or more major joints. (38 C.F.R. Part 4, Diagnostic Code 5003).

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt means a substantial doubt and one within the range of probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

Notwithstanding the differences of opinion that have been expressed as to the nature of the veteran's service-connected knee disability, it has been classified for rating purposes as degenerative joint disease, i.e., arthritis. Moreover, there is an X-ray interpretation showing arthritis. Moreover, where the veteran does not manifest any limitation of knee motion or for that matter any particular impairment of knee function, the applicable diagnostic criteria provide for a ten percent (10%) rating when two major joints are involved. Under the circumstances, the Board finds that the assignment of a ten percent (10%) rating is warranted for the veteran's bilateral knee disability.

FINDING OF FACT

The veteran's degenerative joint disease of the knees is characterized by X-ray evidence of degenerative changes in both knees without any limitation of knee motion.

CONCLUSION OF LAW

A ten percent (10%) evaluation is warranted for degenerative joint disease of the knees. (38 U.S.C. 35; 38 C.F.R. 3.102, Part 4, Diagnostic Code 5003)

DECISION

Entitlement to an increased (compensable) rating for degenerative joint disease of the knees is established to the extent indicated. The appeal is allowed subject to regulations governing the award of monetary benefits.

RATING DECISION

File: C-27 024 464

Date of Claim: 5-27-83

Date of Last Examination: 12-20-82

Date of Birth: 11/20/49

No. of S/C Disab. (0 through 9) (9 to show 9 or more): 1

Physical Exam: (No exam), Reason: 01

Date of this Rating: 6-22-83

Narrative:

J. Allowed appeal.

I. Increased evaluation for degenerative joint disease of the knees.

F. In decision of 5-27-83, the Board of Veterans Appeals allowed 10 percent evaluation for the knee condition. Claim for increase was originally received 2-20-79.

1. SC (VE INC)

5260	Degenerative Joint Disease, Knees
	0% from 6/11/73
	10% from 2-20-79

8. NSC VE

5099-5009	60% Sarcoid Arthralgia
6799-6802	30% Sarcoidosis

2. PT VE from 12/16/79

COMB	NSC 80%

IN THE APPEAL OF
ALBERT MORGAN, JR. C 27 024 464

BOARD OF VETERANS APPEALS
WASHINGTON, DC 20420

FINDINGS AND DECISION	)	DOCKET NO. 86-34 176
	)	DATE: Oct. 22, 1987

THE ISSUE

Entitlement to service connection for sarcoidosis.

REPRESENTATION

Appellant represented by: The American Legion

CONSULTATIONS BY THE BOARD

B.J. Marinelli, Staff Legal Adviser

REMAND

A preliminary review of the record shows that the veteran's active service extended from July 1969 to July 1971. The Board of Veterans Appeals in 1982 and 1986 denied entitlement to service connection for sarcoidosis. The veteran and representative contend, in substance, that the veteran does have sarcoidosis which was present in service and that the service connected joint pain was a consequence of the sarcoidosis. The representative observes that there has been a difference of opinion among medical specialists as to the etiology of the veteran's service connected knee problems. The representative requests that the Board consider submitting the claim to an independent medical expert for resolution of the conflict in opinions.

In view of the representative's request and to assure a complete and equitable decision, the case is REMANDED to the regional office for the following action:

1. All available X-ray films of the veteran's chest and joints, especially the knees, should be obtained and associated with the claims file.

2. Thereafter the veteran should be examined by a rheumatologist who has not examined the veteran previously. It is requested that the examiner provide

a detailed description of the veteran's complaints, clinical findings, and diagnoses as well as the results of any indicated special studies. It is also requested that current X-ray studies should be obtained of the joints involved and in particular the feet and hands. The old X-ray films and current X-ray films should be read for the purpose of providing an opinion as to the etiology of the joint disease. The claims folder should be made available to the examiner before the examination.

After the requested development has been accomplished, the regional office should again review the claim. If the benefits sought are again denied, the case and all X-ray films should be returned to the Board after compliance with the procedures for processing appeals.

The purpose of this remand is to obtain clarifying information. No opinion is expressed, either legal or factual, concerning the ultimate determination warranted.

No action is required on the veteran's part until further notice is received.

UNITED STATES COURT OF VETERANS APPEALS

No. 91-1865

Albert Morgan, Jr., Appellant,

v.

Jesse Brown,

Secretary of Veterans Affairs, Appellee.

Before FARLEY, *Associate Judge.*

MEMORANDUM DECISION

FARLEY, *Associate Judge:* This is an appeal from a September 19, 1991, decision of the Board of Veterans' Appeals (BVA or BOARD) which denied appellant's claim of entitlement to service connection for sarcoidosis of the knees. The Board based this denial on the grond that appellant did not submit new and material evidence sufficient to warrant the reopening of his claim which had been the subject of four previous and final denials by the BVA. A timely appeal to this Court followed. The Court has jurisdiction pursuant to 38 U.S.C.A. § 7252(a) (West 1991). On April 4, 1992, appellant, through counsel, filed a brief. On December 7, 1992, the Secretary of Veterans Affairs (Secretary) filed a motion for summary affirmance, for acceptance of the motion in lieu of a brief, and for a stay

of proceedings pending a ruling on this motion. Appellan'ts counsel opposed the Secretary's motion in a reply brief filed December 17, 1992.

In the Counter Designation of the Record appellant notified the VA that a bone scan report dated May 3, 1988 (R. at 391), was not his. In the Transmission of the Record on Appeal (TR) the Secretary acknowledged this error and agreed that another veteran's bone scan was in appellant's claims file. (TR at 1). Because inaccurate information was before the RO and the Board when decisions regarding appellant's claim were rendered, a remand is requred. Upon remand, the Secretaery will have the opportunity to remove the bone scan from appellant's file, as he has offered to do, to obtain additional medical opinions, and to have appellant's claim readjudicated *ab initio*. On remand, the appellant will be free to submit additional evidence and argument with respect to the claim, and the Board will "seek any other evidence it feels is necessary" to the timely resolution of this claim. *See Quarles v. Derwinski*, 3 Vet. App. 129, 141 (1992).

Accordingly, the September 19, 1991, BVA decision is VACATED and the matter is REMANDED for readjudication consistent with this decision

DATED: Apr. 7, 1993

ARKANSAS RHEUMATOLOGY. P.A.
(address)

June 28, 1983

Mr. W.J. Walker, Attorney at Law
601 Rock Street
P.O. Box 946
Little Rock, AR 72203

RE: Mr. Albert Morgan
ARIMA # 2752

Dear Mr. Walker:

As with many of our patients the final diagnosis is not understood or forgotten. Mr. Morgan has neither Rheumatoid arthriria nor degenerative arthritis.

Very truly yours,

Donald G. Leonard, M.D.

cc: Mr. Albert Morgan

MARK R. BURNS, M.D.
DIVISION OF RHEUMATOLOGY
DEPARTMENT OF MEDICINE
MONTEFIORE MEDICAL CENTER
CENTENNIAL 3
111 E. 210 STREET
BRONX, NY 10467
(718) 920-5456
FAX (718) 920-8375

June 26, 1997

Travis Vassar
Board of Veteran's Appeals
810 Vermont Avenue, N.W.
Washington, D.C. 20420

RE: Review of Record of Patient A.M.

Dear Mr. Vassar:

I am a Board-Certified Rheumatologist, and I have conducted a review of the medical record of A.M. The issue under review is whether knee pain that A.M. experienced while on active due until 7/71 was related to a diagnosis of sarcoidosis made in 1978. I will confine further remarks to

the period prior to the time of the establishment of a diagnosis of sarcoidosis in 1978.

A.M. began to complain of knee pain in July, 1970. He had a medical evaluation in 10/71, at which time he had no other symptoms, and findings on physical exam were normal except for slight knee tenderness. The diagnosis at that time was probable chondormalacia patellae, although osteoarthritis was also diagnosed based on purported X-ray findings.

A.M. had repeated exams during the period from 1971-fall 1976, when he started having the diffuse myalgias and arthralgias as well as the fevers and other manifestations of sarcoid. There is no documentation of any complaints compatible with sarcoid, other than knee pain, during this period. Repeated knee exams (1973, 1975) revealed no inflammatory signs. Chest X-rays and knee X-rays in 10/73 and 8/76 were normal.

There are two issues concerning radiologic studies that I would like to address first:

1) The initial knee X-rays did not show significant osteoarthritis. This fact, however, has little impact on the case (except insofar as it clouded the issue as to the cause of A.M.'s knee pain in 1971). X-rays done in 1976 did not

show osteoarthritis, so it is not likely that it existed in 1971.

2) The bone scan of 7/77 was compatible with arthritis, but in no way was it diagnostic of sarcoid arthritis. A bone scan is not able to distinguish diagnostically among a wide variety of arthritides, although certain patterns of uptake on the scan would point to certain types of arthritis. The scan has to be correlated with other information. In this case, by 1977 the symptoms of sarcoid were emerging, and the bone scan findings therefore were evidence for sarcoid arthritis. However, this does not at all help address the issue of whether the knee pain in 1971 was from sarcoid.

There are a number of potential causes of knee pain in a 22 y/o subjected to the physical stresses of being a soldier. There are soft-tissue problems as well as such problems as chondromalacia and internal derangements of the knee.

There are a number of musculo-skeletal manifestations of sarcoid, of which 3 are of potential interest here. One is **bone involvement**, which would be diagnosed by X-ray. The persistently, normal X-rays do not give evidence of this.

Sarcoid can be present as **acute sarcoid arthritis** with arthritis and/or soft-tissue inflammation around joints. This is often associated with skin rashes, virtually always with a positive CXR, and the presence of sarcoid is established

either immediately or shortly thereafter. No inflammation had ever been demonstrated on physical, and the rest of the picture was not present here.

There is a **chronic** sarcoid arthritis, which can involve one or many joints. It is diagnosed clinically in a patient with obvious sarcoid, or can be diagnosed by biopsy. X-rays usually show some combination of findings compatible with a chronic destructive arthritis. The patient had normal X-rays as late as 1976. It would be unusual for a patient with chronic sarcoid arthritis to have persistent joint symptoms for at least 6 years (i.e. 1970-1976) with no X-ray changes. Also, during this period no inflammatory signs were noted in the knee, and there were no other signs of sarcoid. Therefor, the probability that the knee pain in 1971 was due to chronic sarcoid arthritis was very low.

I do not know for sure what was the cause of the knee pain A.M. had while on active duty. MRIs were not yet available at the time; they are by far the best imaging procedures for soft-tissue problems and internal derangements. Bony involvement from sarcoid and acute sarcoid arthritis are untenable diagnoses here. Chronic sarcoid arthritis was unlikely to have have been present from 1970-1976 without other signs of sarcoid and without X-rays changes.

I do not feel that sarcoid arthritis was likely to be the cause of A.M.'s knee pain from 1970-71. The available evidence does not point to the presence of sarcoid and it's associated arthritis until 1976.

Sincerely,

Mark R. Burns, M.D.

VETERANS ADMINISTRATION MEDICAL CENTER
SHREVEPORT, LOUISIANA
January 8, 1980

RE: MORGAN, Albert, Jr.
SS: 432-94-70-73

ORTHOPAEDIC, GENERAL MEDICAL AND PULMONARY EXAMINATIONS

HISTORY: This 30 year old black male veteran states that while in Vietnam in 1970 he began to have pain in the right knee. This gradually increased and he also noted pain in the left knee. The pain was not severe but was quite annoying. The veteran was seen at sick call and was eventually put on limited duty because of the knee problem as well as some low back pain. At the time of discharge from the military the veteran was still on a profile. He was under the impression that he had some mild form of arthritis effecting his knees.

The veteran obtained a job working in a VA Hospital and for 7 years worked as a nursing assistant. He continued to have pain in the knees which slowly increased and eventually effected the lower back and other joints. Apparently his x-rays were negative until approximately 1977 when he

believes x-rays showed changes in the knee joints. The veteran was found to have converted to a positive tuberculin test in 1976. He believes he was last negative 4 years earlier which test was done by this VA Hospital. This veteran then developed sufficient pain in the knees and other joints to force him to be hospitalized. He also had episodes of fever and weakness. Eventually a biopsy of the liver was done and he was told that it showed evidence of granuloma. He also had a biopsy of a lymph node at the base of the right neck and this also showed changes compatible granuloma. In view of the positive tuberculin test the veteran was given a trial of INH and Ethambutol. He states that he believes his joint pains were slightly improved and he felt somewhat better but still continued to have his complaints of multiple joint pains, weakness, and episodes of fever. In approximately April of 1978 the veteran was reevaluated because of increased...and he was told that changes in his liver functions test warranted the...of the Ethambutol and INH. He was then told that the most likely diagnosis was sarcoidosis and he was put on steroids. At one time he was taking 100mg on alternate days. His symptoms improved and his knees became less painful but he did not recover. He has been on steroids for over a year and is now taking a small dose on maintenance basis.

In the last 2 months his joint pains have become worse particularly in the knees and midback. He also has pains in

the ankles,...and various other joints. The pain seems to migrate. He believes that his heart showed enlargement for a while and became smaller. He also has occasional episodes of fever. He was told that he had a heart murmur but apparently no diagnoses of heart disease was made.

At present the veteran is taking Prednisone 10 tablets on alternate days together with Motirn and Etrafon. He is being followed in the VA out patient clinic in Little rock and his appointment card shows appointments at 3 month intervals. He however, reported last week complaining of chest pain and weakness and was given an electrocardiogram followed by an electrocardiogram stress test. He does not know the results of this last study.

Present complaint: General exhaustion, multiple joint pains, 3 episodes of fever. Skin, negative. Lymphatics and hemic systems negative. Head, neck and face are negative. Teeth in good condition. Pharynx is negative. Ears are externally negative. There is no hearing loss noted. Eyes are externally negative. The heart is regular, no murmur and has tones of good quality. The veteran has good pulsation in the feet. There is no edema. There are no varicose veins. There are no basil pulmonary rales heard in the respiratory examination. No persistent rales or wheezes. The breath sounds are normal bronchial vesicular throughout. On coughing and deep breathing an occasional coarse rale was

noted but these varied and cleared as the veteran coughed and breathed deeply. Shape of the chest is normal. The abdomen is soft with no masses or tenderness. First percussion over the liver yields the complaint of tenderness. No hernia present. Genitourinary system is negative. The veteran is slight obese and appears to be in good general health but walks very carefully and with a limp on the right. His manner of walking and moving about suggests that he has considerable joint discomfort and is fearful of producing more marked pain. The veteran's standing posture is somewhat abnormal in that he keeps the right knees slightly flexed and tends to tilt the pelvis slightly to the left with a list of the trunk to than direction. When asked to stand straight the veteran straightens up somewhat but does not completely correct these abnormalities of posture described. There also appears to be an increase in the lumbosacral curve. When asked to heel and toe walk the veteran declines to do so saying that will produce pain and will start his joint pains to giving him severe pain. When asked to do a full squat the veteran states that he is unable to do so as his knees are too painful and weak.

With the veteran supine palpation and inspection reveals no swelling or abnormality in shape of the ankle joints, knee joints or hip joints. There is no heat or swelling of these joints. There is no real tenderness although the veteran states he has discomfort on firm pressure. The patellars can

be moved without any particular grating or difficulty. After considerable coaxing the veteran permits mpassive motion of the knees for a short distance perhaps moving each knee 40 to 50 degrees. No grating or unusual effects are noted. The veteran moves the ankle joint through a distance of about 3/4 the normal motion but resists further efforts at moving these joints. On attempting straight leg raising the veteran complains of pain in the knees and at the point at which the legs are supported in raising. The veteran states that he has on trouble with his hips and they can be laterally abducted for a short distance and moved slightly in other directions without complaints.

It would appear that the veteran has multiple joint tenderness or one has to discount his complaints completely. With the veteran prone palpation to the spine reveals no major bony deformities. The veteran shows slight increase in muscle tone in the midperivertebral area but there is no true spasms and no significant tenderness. The sciatic notches are not tender.

The veteran has good motion of the upper extremities bringing down to lateral abduction to 175 degrees and shows good motion of the elbow, wrists and hands and a relatively good grip on squeezing the examiner's finger. The veteran will not make firm pressure and if he exhibited his maximum grip it would be estimated to be about 60% of

normal. The veteran has full motion of the cervical spine although he complains of tenderness particularly on anterior flexion.

Endocrine system is negative. In the nervous system patellar and Achilles reflexes are present and equal.

The veteran apparently has had a rather extensive medical evaluation together with a treatment period of several years at the VA Hospital in Little Rock. These records are not available to the examiner but the results should be known to the rating board for a fair evaluation of this case. If the veteran's history and account of studies done including the positive tuberculin test and biopsy reports sarcoid it would seem logical to conclude that this veteran does have sarcoidosis and that it is now sufficiently active to prevent him from working. The multiple joint pains are probably related to the sarcoid process. As this examiner does not have access to any of these materials and does not have access to the C-file his diagnosis will have to be made on the basis of the history from the patient.

IMPRESSION:

1. Sarcoidosis with symptoms of weakness and multiple joint pain sufficient to prevent work. Diagnosis based on history of biopsy of the liver

and of a neck lymph node showing the App. 76
typical changes of sarcoid.

2. History of conversion of tuberculin to positive with negative findings as far as search for tuberculous bacilli is concerned.
3. Arthritis effecting multiple joints apparently secondary to sarcoidosis.
4. History of hemorrhoids with minimal symptomatology no evidence of significant hemorrhoids at this time.

DIAGNOSIS: Same as impression with the following exceptions.

John C. Crenshaw, M.D.

CLINICAL RECORD CONSULTATION SHEET

CONSULTATION REPORT

Veteran's claim folder is reviewed. He is 30 years of age at this time and had a history of multiple joint pain that has been diagnosed both as arthritis arthralgia, likely related to sarcoidosis. Considering his age, and with complaints that he has had, along with a proven biopsy, a diagnosis of sarcoid- I conclude that his knee complaints are on the basis of sarcoidosis.

Title: ...P. Miller, M.D. Date: 5/29/80

BETTON CLINIC

MEDICAL REPORT
ALBERT MORGAN JR

May 29, 1986

Mr. Morgan has been a patient of mine for quite some time. I first evaluated him in 1983 for sarcoidosis and joint pain. I reviewed and rereviewed his old records from Dr. Raymond Miller, Dr. David Barnett, Dr. Robert Lewis and other VA records and agree wholeheartedly that this patient still has problems with his knees and that the link lies with his sarcoidosis. While in the service he was diagnosed as having arthritis. The arthritis was later diagnosed as due to sarcoidosis. It therefore stands to reason that the sarcoidosis existed while he was in the service and service connections for arthritis must have service connection for this sarcoidosis since the sarcoidosis is the etiology for the arthritis.

Harold B. Betton, M.D.

Dr. Harold B. Betton, M.D., P.A.
1505 West 11th (Corner 11th & High)

MEMORANDUM

July 23, 1980

TO WHOM IT MAY CONCERN

From: Staff Orthopedist
Subj.: Albert Morgan, SS # 432-94-7073

Mr. Albert Morgan, a patient I have seen in the Orthopedic Clinic at the V.A. Medical Center, has requested that I review his chart and make a note in the chart in reference to his physical condition. This gentleman was seen in the Orthopedic Clinic in the fall of 1979 with a history of sarcoidosis and multiple large joint pains. The examination of this gentleman did not lead to any positive findings, and a bone scan was subsequently undertaken. The bone scan showed by report, myself not having the report at this time for review, increased uptake in multiple large joints. It was felt that this was compatible with his previously made diagnosis of sarcoidosis with joint involvement. As stated previously, his examination did not bear out any joint manifestations of his disease, and his only complaint was pain. Therefore, the patient was referred to the Rheumatology Service for their evaluation with the diagnosis of sarcoidosis with joint involvement.

David C. Barnett, M.D.

CLINICAL RECORD CONSULTATION SHEET

To: Ortho Clinic From: 2nd D... Date 23 Feb 71

Reason for Request: possible arthritis both knees. Any suggestions for therapy?

Consultation Report:

21 y/o ...stair climbing (6 mos), sitting with knees bent.
Xrays – WNL.
By my exam, he has 3+ patella crepitin bilateral, and + PF compression pain.
By chondromalicia patellae, moderatley severe.
Rx and set profile L-T3. RTR 2 mos.

Date 4/19 ID # 432-94-7073 Org. C 2/50 Inf 24D

App. 81

MEDICAL CERTIFICATE AND HISTORY

BRIEF HISTORY, SYMPTOMS AND PHYSICAL
LABORATORY, X-RAY, EKG AND OTHER FINDINGS:

5/24/73 10:53 AM WT 233 AGE 23

Both knees hurt – no injury history
Does not lock – history of cripitance
Pain is under patellae – no swelling
Exam – not revealing, good stability
X-Ray – neg
Orthop – chondromalaria

Diagnoses: Chondromalacia
Temperature: 97.6
Pulse: 48
Respiration: 16
Blood Pressure: 140/96

Veterans
Administration

MORGAN, Albert
#7073

April 30, 1980

To Whom It May Concern:

I saw Albert Morgan on consult September 19, 1979 complaining of low back pain and knee pain. It was my opinion at that time that both complaints were most likely due to underlying sarcoidosis and I agreed with the therapy he was receiving from the Pulmonary Disease Section to control this. In addition, anti-inflammatory analgesic drugs with muscle relaxants were prescribed in an effort to ameliorate this condition.

Robert B. Lewis, M.D.
Chief, Rheumatology Section

NORTHSIDE ORTHOPEDIC CLINIC, P.A.
501 West 25th Street
North Little Rock, Ark. 72114
Telephone: 758-2046

THOMAS P. ROONEY, M.D., F.A.C.S.
Orthopedic and
Hand Surgery

September 18, 1980

Veterans Administration
300 East Roosevelt Rd.
Little Rock, AR 72206

TO WHOM IT MAY CONCERN:

Mr. Morgan is a 30 year old man who gives a history of development of pain in both knees in about 1970, while on active duty in the Service. It has continued to this time as an aching type pain, sometimes extending into the calves and up into the thighs. He has not noticed any swelling, locking or giving way. It extends into the low back at times. He was diagnosed as having sarcoidosis and has been on Cortisone and Indocin, as well as Parafon Forte for his back and leg pains. He occasionally has discomfort in the right

elbow.

His lab evaluations at the VA Hospital for other types of arthritis, apparently, have been within normal limits.

On examination of both knees, there is no abnormalities. No increased temperature or swelling is present. He has full motion. Thighs and calves measure the same in circumference. There is no effusion in the elbow.

X-rays from the VA Hospital of the knees are normal. I certainly agree that the joint pains could be a manifestation of the sarcoidosis and is probably related.

ARKANSAS RHEUMATOLOGY, P.A.
Suite 150, Parkview Medical Office Building
#1 ST. Vincent Circle, Little Rock, AR 72205
Phone (501) 664-2466

Donald G. Leonard, M.D.
Diplomatic A.B.L.M.
and Rheumatology

Practice limited
to treatment of
rheumatic
disorders

7 December 1987

Veterans Administration
1200 West 3rd
Little Rock, Arkansas 72204

Re: Albert Morgan, Jr.
ARPA No. 2752

Gentlemen:

Please be advised that it is my opinion that the cause of the arthralgias/arthritis of the knees in the above-named patient may be secondary to his diagnosis of sarcoidosis, though at this moment it is impossible to prove this for certain.

Sincerely,
Steward Leibowitz, M.D.
Arkansas Rheumatology, P.A.